IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRADLEY D. KENYON, Appellant.	No. 40842-2-II UNPUBLISHED OPINION

Johanson, J — Bradley Kenyon appeals his jury trial conviction for delivery of methamphetamine and a school bus stop sentencing enhancement. Kenyon asserts various claims on appeal: (1) insufficient evidence, (2) ineffective assistance of counsel, (3) prosecutorial misconduct, (4) improper jury instructions, and (5) jury misconduct. We affirm.

FACTS

I. Underlying Crime

In September 2009, the West Sound Narcotics Enforcement Team (WestNet), at the direction of Shelton Police Detective Tasesa Maiava, used a confidential informant (CI), to execute a controlled buy of methamphetamine from Bradley Kenyon at his Shelton home. Shelton Detectives Maiava and Inklebarger met the CI at a secure location and discussed the details of the

controlled buy. They searched the CI to make sure she was not carrying any contraband. Following the search, Detective Maiava gave the CI prerecorded funds for the purchase.

Detective Maiava drove the CI to an intersection near Kenyon's home and let the CI out of his car. The CI walked down C Street and turned toward Kenyon's trailer. Detectives Inklebarger and Maiava positioned themselves in different observation locations, and together, they never lost sight of the CI until she entered the trailer. The CI left Kenyon's trailer 10 minutes later, and the detectives again maintained visual contact with her until she returned to Detective Maiava's awaiting vehicle. Inside the car, the CI handed Detective Maiava a baggie of crystal methamphetamine she had purchased from Kenyon. Detective Inklebarger remained in his observation position for a few minutes to see whether anyone else left the trailer. No one else left during that time.

II. Procedure

After the controlled buy, Detective Maiava used a wheeled measuring device to measure the distance from Kenyon's trailer to the nearest Shelton School District bus stop. The Shelton School District had informed Detective Maiava that the nearest bus stop was at Olympic Highway North and C Street, in front of Skipworth's saw shop,[1] and Detective Maiava testified that he had seen children waiting for the bus in front of Skipworth's.

The State charged Kenyon with delivery of a controlled substance. RCW 69.50.401. The State added a sentence enhancement because Kenyon delivered the drugs within 1000 feet of a

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[1] Shelton School District officials told Detective Maiava that the bus stop was located at Olympic Highway and C Street, in front of Skipworth's. The school district's bus route printout, admitted as State's exhibit 4, listed the stop at C Street and Adams—a block away from Olympic Highway North.

school bus stop. RCW 69.50.435.

Just before trial, Kenyon filed motions to continue the trial and to request appointment of new counsel. He claimed that his mother's testimony would exonerate him, but against counsel's advice, Kenyon's mother left for Texas and missed the trial. The trial court denied both motions. At trial, the CI testified that she and Kenyon were the only people in the trailer and that she purchased the methamphetamine from him.

After the defense's case, Kenyon moved for a directed verdict on the sentence enhancement. He argued that the State failed to adequately demonstrate that the Shelton School District had designated the site in front of Skipworth's saw shop as an official bus stop. The trial court denied this motion because Detective Maiava had consulted Shelton School District to determine the bus stop's location, and he had adequately described the school bus stop site from his personal experience.

During Kenyon's closing argument, his defense counsel pondered: "[T]here could have been somebody else in that trailer. That's a reasonable doubt. That's a reason to doubt, and that's the end of this case." 14 Verbatim Report of Proceedings (VRP) at 207. During the State's rebuttal, this exchange occurred:

> [State:] The defense is not obligated to put on any kind of a case whatsoever. But you have to ask yourself if someone argues to you about what if there's somebody else in the trailer, wouldn't you want to hear from that person?
> [Defense:] Objection, your Honor, it's improper.
> [Court:] Overruled.
> [State:] Again, they don't have to do anything; can sit on their hands throughout trial, ladies and gentlemen. But if you make a suggestion, if you argue that there's maybe some kind of missing witness—
> [Defense]: I object, your Honor. This shifts the burden. It's improper.
> [Court:] Overruled.

> [State:] —do you want to see it or not?
> [Defense:] And I object. There's no ground for any missing witness instruction or any missing witness argument.
> [Court:] Counsel, overruled.

14 VRP at 216-17.

The court instructed the jury regarding the special verdict form: "Because this is a criminal case, all twelve of you must agree in order to answer the special verdict form." Clerk's Papers (CP) at 170. Kenyon did not object to this instruction. The jury convicted Kenyon on the delivery charge and included the sentence enhancement.

Defense counsel learned later that, during a trial recess in the jury room, juror 4 commented that Kenyon's female supporters in the gallery resembled the "Manson family" because of their dress. 17 VRP at 297. The trial court held a posttrial hearing to determine whether an evidentiary hearing or new trial would be necessary due to juror misconduct. The trial court concluded that juror 4 was not referring to Kenyon, and her comment was not based on extrinsic evidence that the jury considered during deliberations. Thus, the court determined that the comment, heard by some jurors, did not prejudice Kenyon and that the verdict should stand.

ANALYSIS

I. Sufficiency of the Evidence

Kenyon argues that insufficient evidence supports his conviction for delivery of a

controlled substance and the sentence enhancement. Kenyon also argues that the State failed to establish the reliability of the wheeled measuring device. The State is correct that witness

testimony sufficiently supports both the conviction and sentence enhancement. In addition, Kenyon failed to preserve for appeal the trial court's admission of the measurements.

A. Standard of Review

This court reviews a claim of insufficient evidence for whether, when viewing the evidence in the 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. Yarbrough*, 151 Wn. App. 66, 96, 210 P.3d 1029 (2009) (quoting *State v. Rempel*, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990)). A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences therefrom. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980). "In determining the sufficiency of the evidence, circumstantial evidence is not to be considered any less reliable than direct evidence." *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The trier of fact makes determinations of credibility, and those determinations are not subject to review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). This court defers to the trier of fact on issues of conflicting testimony, witness credibility, and the persuasiveness of evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011 (1992).

Finally, a party must preserve issues for appeal at the trial court. Accordingly, we may refuse to review any claim of error a party failed to raise at the trial court absent a manifest error affecting a constitutional right. RAP 2.5(a)(3).

B. Delivery of Methamphetamine

Kenyon asserts insufficient evidence supports his conviction for delivery of methamphetamine. This argument fails.

The CI testified to buying methamphetamine from Kenyon. She also testified that Kenyon was the only person inside his trailer during the controlled buy. Moreover, Detectives Maiava and Inklebarger both testified that the CI went into Kenyon's trailer with $130 and no drugs; and she emerged with no money and a bag of methamphetamine. Taking all this evidence, any rational trier of fact could have concluded that the State proved all the essential elements of delivery of a controlled substance beyond a reasonable doubt.

C. Reliability of Measuring Device

Kenyon next argues that we should vacate his sentence enhancement because the State failed to establish the reliability of the wheeled measuring device used to measure the distance between the bus stop and Kenyon's trailer. Though the State did not make a prima facie showing of the measuring device's accuracy, Kenyon failed to preserve this issue for appeal.

Kenyon did not object to the lack of foundation laid for the wheel measuring device, nor did he object prior to the admission of the measurement. Therefore, we will not entertain the claim of error on appeal. *See* RAP 2.5(a)(3).

D. Sentence Enhancement

Kenyon argues that insufficient evidence supports the sentence enhancement because (1) the State cannot establish the exact location of the bus stop and (2) Detective Maiava only measured the distance between Kenyon's trailer and one of two possible bus stops. The State is correct that sufficient evidence supports the school bus stop enhancement.

Detective Maiava testified that he contacted the Shelton School District bus garage, the entity with "jurisdiction over bussing," and the school informed him that the closest bus stop was at Olympic Highway North and C Street, in front of Skipworth's saw shop. 2 VRP at 139. Detective Maiava also testified to seeing children waiting for the bus in front of Skipworth's. Finally, Detective Maiava testified that, using a wheeled measuring device, he measured 525 feet, well within 1,000 feet from the school bus stop in front of Skipworth's to Kenyon's trailer. This evidence suffices to prove all the essential elements necessary to convict Kenyon on the special enhancement.[2] *See Yarbrough*, 151 Wn. App. at 96.

II. Effective Assistance of Counsel

Kenyon claims ineffective assistance of counsel for numerous reasons: (1) failure to challenge the reliability of the wheeled measuring device; (2) failure to object to the special verdict jury instruction requiring unanimity; (3) failure to prepare and conduct adequate investigation; (4) failure to impeach or confront State's witnesses or reveal their ulterior motives; (5) failure to communicate; (6) failure to rebut State's "Character Assassinations" of Kenyon; (7) failure to present expert witnesses; (8) failure to adequately present a defense; and (9) failure to act loyally. Statement of Additional Grounds (SAG) at 14. These claims lack merit.

[2] At one point, the State asked Detective Maiava if he was familiar with the bus stop at "C Street and Adams," creating confusion about a second bus stop. 2 VRP at 143. Apparently, the State's mention of the bus stop at C Street and Adams referenced the same bus stop in front of Skipworth's; so, there does not appear to be a second bus stop but more likely a single bus stop with multiple names. Regardless, Detective Maiava testified that he knew the C Street and Adams stop to be the school bus stop site.

A. Standard of Review

Washington has adopted the United States Supreme Court's two-pronged *Strickland* test for questions of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). The *Strickland* inquiry states:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable."

State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland*, 466 U.S. at 687). Under this standard, deficient performance falls "below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to defense counsel's decisions in the course of representation. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

To prevail on an ineffective assistance claim, a defendant must overcome "'a strong presumption that counsel's performance was reasonable.'" *Grier*, 171 Wn.2d at 33 (quoting *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). Performance is not deficient when counsel's conduct can be characterized as legitimate trial strategy or tactics. *Kyllo*, 166 Wn.2d at 863. Finally, when an appellant brings a claim on direct appeal, this court will not consider matters

outside the trial record. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

B. Failing To Object at Trial

Kenyon argues that his counsel ineffectively assisted him by failing to object to the reliability of the wheeled measuring device and failing to object to the sentence enhancement jury instruction. Counsel was not ineffective.

Detective Maiava measured the distance from the bus stop to Kenyon's trailer at 525 feet—obviously within 1,000 feet. Even if counsel had objected to the reliability of the wheeled measuring device, the objection would have done little more than draw further attention to the methamphetamine delivery occurring near a school bus stop. An objection would have prompted the State to submit additional evidence to bolster its claim that Kenyon sold the drugs within 1,000 feet of a school bus stop. Because legitimate trial tactics do not constitute deficient performance, trial counsel's failure to object to the reliability of the wheeled measuring device does not constitute ineffective assistance. *See Kyllo*, 166 Wn.2d at 863.

Finally, at the time of trial, the Washington Pattern Instructions Committee accepted the instruction used as standard law. Defense counsel's failure to challenge the instruction did not constitute deficient performance but rather normal practice.[3] Therefore, it was reasonable that defense counsel did not object to the sentence enhancement instruction. *See Strickland*, 466 U.S. at 688.

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[3] *See State v. Brown*, 159 Wn. App. 366, 372, 245 P.3d 776, *review denied*, 171 Wn.2d 1025 (2011) (counsel's failure to anticipate changes in the law does not amount to ineffective assistance).

C. Failure to Conduct Adequate Investigation

Kenyon asserts that his counsel failed to call, attempt to call, or interview witnesses who could provide favorable testimony to impeach the State's witnesses.

Apparently, Kenyon intended his mother to testify that on the day of the controlled buy, she was with Kenyon and that he did not sell methamphetamine to the CI. When Kenyon's wife asked defense counsel whether Kenyon's mother should travel to Texas for the winter, defense counsel advised Kenyon's wife, "I would tell her not to go because we have trial." 1 Supplemental VRP (SVRP) at 8. Kenyon's mother traveled to Texas anyway. Defense counsel reasonably advised Kenyon's mother to stay in the area for the trial, and she declined; moreover, defense counsel could have felt Kenyon's mother's testimony would not have been helpful to his trial approach. Reasonable advice and defense tactics do not give rise to an ineffective assistance of counsel claim. *See Grier*, 171 Wn.2d at 33.

Defense counsel noted that he had other witnesses available, but he feared that the "jury's going to say [the other witnesses' testimony] is canned testimony and they're not going to believe [their testimony]. And I prefer to take another attack." 1 SVRP at 9. Here, defense counsel properly exercised his right to choose his own legitimate trial tactics. *See Kyllo*, 166 Wn.2d at 863.

D. Failure to Impeach Witnesses

Kenyon next argues that defense counsel failed to adequately impeach the State's witnesses. Specifically, Kenyon believes that (1) defense counsel should have impeached the CI regarding her drug use and violating her CI agreement; (2) he should have impeached officer

testimony about searching the CI prior to and after the controlled buy; and (3) he should have questioned the detectives' method of recording evidence.

Kenyon's arguments appear to be unfounded, as the record demonstrates that defense counsel performed each of the acts Kenyon claims he failed to do. Counsel *did* question the CI regarding her violating her CI agreement—through her continued drug use—until the State successfully objected. Defense counsel *did* question Detective Maiava about his method of searching the CI for contraband prior to the buy. Finally, defense counsel did question Detective Maiava, in detail, regarding the steps he used in logging in and reporting the drugs.

Given defense counsel's efforts cross-examining the State's witnesses, Kenyon fails to overcome the strong presumption that counsel's performance was reasonable. *See Grier*, 171 Wn.2d at 33. Accordingly, Kenyon fails to demonstrate ineffective assistance of counsel.

E. Failure to Communicate and Rebut State's Character Assassination

Kenyon asserts that his defense counsel failed to communicate with him and failed to rebut the State's "Character Assassinations" of him. SAG at 14. These contentions raise issues beyond the scope of the record on review, and we will not consider matters outside the trial record. *McFarland*, 127 Wn.2d at 335.

F. Failure to Present Expert Witnesses

Kenyon claims defense counsel's failure to call expert witnesses from the Shelton School District to verify the location of the bus stop constitutes ineffective assistance of counsel. This claim is unsubstantiated.

The State had already introduced, over defense counsel's unsuccessful objection, a

document from the Shelton School District listing the district's bus stops; and Detective Maiava testified that a bus stop was located in front of Skipworth's saw shop—the location from which he measured to Kenyon's trailer. Defense counsel created doubts regarding the location of the bus stop after Detective Maiava referred to the bus stop at Olympic Highway and C Street, versus the Shelton School District's formal bus stop listing at C Street and Adams.

Had Kenyon's defense counsel called a Shelton School District employee to testify, the employee may have confirmed Detective Maiava's description of the bus stop in front of Skipworth's, strengthening the State's case. For these reasons, Kenyon's defense counsel reasonably refrained from calling a Shelton School District employee to testify, and reasonable actions do not constitute ineffective assistance. *See Grier*, 171 Wn.2d at 33.

G. Contact with the CI

Kenyon next argues that defense counsel provided ineffective assistance because defense counsel had contact with the CI outside of the courtroom. This claim lacks merit.

Defense counsel noted prior to trial that he had contact with the CI between mid-November 2009 and February 2010. He stated that he "had contact with this individual" and that he had "run into this person out in the community." 10 VRP at 68, 76. The record does not demonstrate how this contact prejudiced Kenyon or rendered his counsel ineffective, and absent support in the record, this claim is not suitable for direct appeal. *McFarland*, 127 Wn.2d at 335.

H. Failure to Act with Loyalty

Lastly, Kenyon asserts that his defense counsel failed to act with loyalty. He argues that his counsel (1) apologized to the CI for asking questions; (2) sought to preclude the State from mentioning a material witness warrant for the CI; (3) refused to accept collect calls; (4) failed to keep appointments; and (5) failed to share the State's discovery and discuss the defense plan.

1. Apologizing to the CI

When the defense cross-examined the CI, counsel questioned her about her criminal history in an apparent attempt to impeach her testimony. Defense counsel asked, "Now let's talk specifically about that criminal history. You have a conviction of unlawful issuance of a bank check—I—I'm sorry, I have to do this—unlawful issuance of a bank check dating from October 28th of 2003, is that correct?" 1 SVRP at 58. Later, the defense asked the CI a question, and before she responded he said, as if the CI had lost her focus, "I'm sorry, [CI]?" 1 SVRP at 58.

Kenyon claims these statements demonstrate disloyalty toward him. These apologies, however, appear to be tactical efforts to win over a jury—or maybe simply courtesies and decorum appropriate in basic human interaction. Accordingly, the apologies did not constitute ineffective assistance. *See Grier*, 171 Wn.2d at 33.

2. Precluding discussion of the CI's material witness warrant

Kenyon argues that defense counsel should not have asked the trial court to preclude mention of the CI's material witness warrant. Also, Kenyon claims defense counsel should have focused on the CI violating her CI agreement with WestNet. These claims lack merit.

First, prior to trial, defense counsel asked the trial court to preclude the State from

mentioning the material witness warrant that the trial court had issued for the CI. 1 VRP at 38. He did so because "it doesn't seem relevant." 1 SVRP at 38. Second, during the CI's cross-examination, defense counsel asked whether she had violated her WestNet CI agreement, and she answered affirmatively before the State successfully objected to end this line of questioning.

Defense counsel acted reasonably in both of these situations, so his efforts did not constitute deficient performance. *See Grier*, 171 Wn.2d at 33.

3. Refusing collect calls, failing to keep appointments and share discovery

Kenyon next claims that defense counsel created an irreconcilable conflict of interest by not accepting his collect calls, failing to keep scheduled appointments, and failing to share the State's discovery with him. But, we will not consider these contentions because they raise issues beyond the scope of the record on review. *See McFarland*, 127 Wn.2d at 335.

III. Prosecutorial Misconduct

Kenyon argues that during rebuttal argument, the State erred by shifting the burden of proof to Kenyon. But, because Kenyon advanced an exculpatory theory during closing, the State was entitled to rebut it.

A. Standard of Review

An appellant claiming prosecutorial misconduct must show both improper conduct and resulting prejudice. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006). A defendant suffers prejudice only where there is a substantial likelihood the misconduct affected the jury's verdict. *State v. Brown*, 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied*, 523 U.S. 1007 (1998). We review a prosecutor's comments during closing argument in the context of the total

argument, the issues in the case, the evidence addressed in the argument, and the jury instructions. *Brown*, 132 Wn.2d at 561.

While it is improper to imply that the defense has a duty to present evidence, the State may properly comment on the evidence. *See McKenzie*, 157 Wn.2d at 58-59. Specifically, the State may comment on the absence of certain evidence if persons other than the defendant could have testified regarding that evidence. *State v. Jackson*, 150 Wn. App. 877, 887, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009) (citing *State v. Ashby*, 77 Wn.2d 33, 37-38, 459 P.2d 403 (1969)). When a defendant attempts to establish a theory of the case by alleging the corroborating testimony of an uncalled witness, the State is entitled to attack the adequacy of the proof and point out weaknesses and inconsistencies, including the lack of testimony which would be integral to the defendant's theory. *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114, *review denied*, 115 Wn.2d 1014 (1990).

In *Contreras*, the defendant was charged with second degree assault. He testified that on the night of the alleged assault, he was nowhere near the assault, but with a friend at the racetrack. *Contreras*, 57 Wn. App. at 472. During closing, the State commented on the defendant's failure to call this friend. *Contreras*, 57 Wn. App. at 473. Division One of this court held that the State is entitled to point out weaknesses and inconsistencies in a defendant's case, including the lack of testimony which would be integral in supporting the defendant's theory. *Contreras*, 57 Wn. App. at 476. The *Contreras* case is similar to this one.

B. No Improper Burden Shifting

Here, Kenyon argued in closing that the CI may have purchased the methamphetamine from somebody else in Kenyon's trailer. Kenyon could have called this exculpatory witness, but he did not. Consequently, the State's comments did not improperly shift the burden of proof. Instead, as in *Contreras*, the State validly drew attention to the defense theory's shortcomings, including the lack of testimony from a witness who could exonerate Kenyon. *See Contreras*, 57 Wn. App. at 476.

Moreover, the trial court properly instructed the jury that closing remarks were not evidence; that the State had the burden of proof; and, that Kenyon was presumed innocent. Also, the State prefaced its remarks reminding the jury that the State bears the burden of proof: "The defense is not obligated to put on any kind of a case whatsoever. But you have to ask yourself if someone argues to you about what if there's somebody else in the trailer, wouldn't you want to hear from that person?" 14 VRP at 216. For these reasons, when taken in the context provided by the evidence and jury instructions, the State's rebuttal statements did not constitute error. *See Brown*, 132 Wn.2d at 561.

IV. Improper Jury Instructions

Kenyon asserts that we should vacate the sentence enhancement because the jury instruction improperly required juror unanimity in order to reach a verdict. But, Kenyon failed to preserve this issue for appeal. We recently addressed the same issue in *State v. Grimes*, 165 Wn. App. 172, 267 P.3d 454 (2011), which controls here. Based on *Grimes*, we hold that Kenyon failed to preserve the sentencing enhancement instruction issue for appeal and fails to show that

this instruction involves a manifest error of constitutional magnitude. *See* RAP 2.5(a)(3); *Grimes*, 165 Wn. App. at 189.[4]

V. Juror Misconduct

Kenyon next argues that the trial court erred by denying his motion for a new trial based on juror misconduct. The trial court did not abuse its discretion in upholding the verdict.

A. Standard of Review

We review a trial court's ruling on a motion for a new trial based on juror misconduct for an abuse of discretion. *State v. Balisok*, 123 Wn.2d 114, 117, 866 P.2d 631 (1994). A court abuses its discretion when it makes a manifestly unreasonable decision or bases a decision on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). We grant a new trial only where juror misconduct prejudiced a defendant. *State v. Earl*, 142 Wn. App. 768, 774, 177 P.3d 132, *review denied*, 164 Wn.2d 1027 (2008). Although prejudice is presumed when misconduct has occurred, one may overcome that presumption by showing that the conduct did not affect jury deliberations. *Depaz*, 165 Wn.2d at 856.

B. Proper Denial of Motion for New Trial

During a trial recess, juror 4 commented to other jurors that some of Kenyon's supporters reminded her of the "Manson family" because of their appearance. 17 VRP at 297. As a result, Kenyon moved for a new trial based on juror misconduct.

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[4] Even if Kenyon could successfully show that the jury instruction claim raises a manifest constitutional error, he cannot demonstrate resulting prejudice. Any error was harmless, as Detective Maiava testified to the distance from Kenyon's trailer to the bus stop in front of Skipworth's—a distance well within the 1,000 feet special enhancement zone. Kenyon did not contradict this evidence at trial.

The trial court gathered juror declarations and held a hearing on the motion. The court concluded that a new trial was not necessary. The trial court observed

> [O]ne juror saying anything, more likely than not one time, on one occasion. And only one juror thought he had heard it—or she had heard it two times. But then again, only one juror saying anything that second time, one phrase. And it was never followed-up on at any time during the rest of the trial, or in deliberations.
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> . . . Juror number 4 said it had nothing to do with the defendant. Juror number 7 said it had to do with the people sitting in the gallery and how they were dressed and behaving.

17 VRP at 276. The trial court added later: "It is also pointed out [Juror 4] was not talking about the defendant, does not know who heard her, did not happen during deliberations, it happened once. There was no discussion about it. And it never entered their deliberations." 17 VRP at 297. Consequently, the trial court upheld the jury's verdict: "[I]n light of the evidence this Court saw, I saw nothing to indicate that the verdict should not be supported at this time, and was justified. The policy of a stable certain verdicts and frank discussion indicates this should sustain itself." 17 VRP at 298.

In sum, the trial court examined the evidence of misconduct, and weighed the potential that Kenyon suffered prejudice before ultimately upholding the jury's verdict and denying Kenyon's motion for a new trial. Thus, the court's action upholding the jury verdict was not manifestly unreasonable or based on untenable grounds, such as to constitute an abuse of its discretion. *See Depaz*, 165 Wn.2d at 858.

We affirm.

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.

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Johanson, J.

We concur:

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Armstrong, P.J.

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Hunt, J.