IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. VERNON WAYNE BENNETT, Appellant.	No. 41564-0-II PUBLISHED IN PART OPINION

Van Deren, J. — Vernon Bennett appeals his convictions for unlawful delivery of a controlled substance, methamphetamine, to a minor, and unlawful delivery of methamphetamine to Ashleigh Penfield, both with school bus route stop enhancements; furnishing liquor to a minor; and unlawful possession of a controlled substance, methamphetamine. He argues that the trial court violated his and the public's right to an open and public trial when it held an in-chambers conference to discuss jury instructions and that the trial court erred when it imposed a school bus route stop sentence enhancement on his methamphetamine delivery to a minor conviction.[1]

[1] In the unpublished portion of the opinion, we discuss Bennett's claims that (1) sufficient evidence does not support his convictions for methamphetamine delivery to a minor and for unlawful methamphetamine possession; (2) the trial court abused its discretion when it admitted into evidence photographs of Bennett's basement; (3) his convictions for methamphetamine delivery and methamphetamine possession violate state and federal constitutional protections against double jeopardy; (4) the trial court abused its discretion by not determining whether his two delivery convictions constituted the same criminal conduct for purposes of calculating his offender score; and (5) he received ineffective assistance of counsel because defense counsel did not argue at sentencing that the delivery convictions were the same criminal conduct.

Finding no error, we affirm.

FACTS

According to Ashleigh[2] Penfield, in November 2008, she and Chelsea Hensley[3], who was 17 at the time, went to Bennett's residence to smoke methamphetamine. Following an investigation and interviews with the persons involved, the State charged Bennett with unlawful delivery of a controlled substance, methamphetamine, to a minor, Hensley (count I), and unlawful delivery of methamphetamine to Penfield (count II), both with school bus route stop enhancements; furnishing liquor to a minor, Hensley, between November 21 and November 22 (count III); and unlawful possession of a controlled substance, methamphetamine, on November 23 (count IV).

At the close of the evidence at trial, the trial court judge and counsel met in chambers[4] to "finalize" the jury instructions. 2 Report of Proceedings (RP) at 145. After the conference, the trial court stated that it and the parties "had an opportunity to go over the instructions" and that the instructions had "been copied and collated." 2 RP at 145. Bennett stated on the record in open court that he had no objections to the instructions.

---

[2] The information filed in this case identifies Penfield's first name as "Ashleigh." Clerk's Papers (CP) at 2. The trial transcript refers to her as "Ashley." 1 Report of Proceedings (RP) at 60. We refer to her as "Ashleigh."

[3] Hensley's driver's license, admitted as an exhibit at trial, identifies her last name as "Hensley." Ex. 2. The information identified Hensley, a minor at the time, as "C.R.H." CP at 1. The trial transcript identifies her last name as "Hinsley." *See, e.g.*, 1 RP at 62. We refer to her as "Hensley."

[4] The record indicates that Bennett was not present during this conference. The trial court referred to meeting only with the attorneys. After the trial recessed and the jury left the courtroom, the trial court judge said, "I want the attorneys to meet me in chambers. I want you to go that way." 2 RP at 145.

The jury convicted Bennett as charged. He appeals.

ANALYSIS

Public Trial Right

Bennett argues that the in-chambers discussion between counsel and the trial court about jury instructions violated his and the public's right to open and public trials under the state and federal constitutions. On the sparse record on appeal in this case, we disagree.

Whether a violation of the public trial right exists is a question of law we review de novo. *State v. Momah*, 167 Wn.2d 140, 147, 217 P.3d 321 (2009), *cert denied*, 131 S. Ct. 160 (2010). The state and federal constitutions guarantee both criminal defendants and the public the right to open and public trials. U.S Const. amends. I, VI; Wash. Const. art. I, §§ 10, 22.

Washington appellate opinions have recognized a link between a criminal defendant's right to be present during critical stages of trial and the defendant's right to a public trial; this link, however, originates, without citation to authority, from *State v. Rivera*, 108 Wn. App. 645, 653, 32 P.3d 292 (2001). As a result, Washington courts have generally held that the defendant's public trial right encompasses "'adversary proceedings'" during trial, such as evidentiary phases, suppression hearings, voir dire, and jury selection. *State v. Sadler*, 147 Wn. App. 97, 114, 193 P.3d 1108 (2008)[5] (emphasis omitted) (internal quotation marks omitted) (quoting *Rivera*, 108

[5] On November 13, 2008, the State filed a petition for review of our decision in Sadler's case with our Supreme Court. On February 3, 2009, our Supreme Court first stayed consideration of the petition in *Sadler* pending its final decisions in *Momah* and *State v. Strode*, 167 Wn.2d 222, 217 P.3d 310 (2009). Following issuance of those opinions, on July 9, 2010, our Supreme Court again stayed the State's petition for review in *Sadler* pending a final decision in *State v. Wise*, 148 Wn. App. 425, 200 P.3d 266 (2009), *review granted*, 170 Wn.2d 1009 (2010). On May 3, 2011, the court also heard oral argument on the public trial right in *State v. Paumier*, 155 Wn. App. 673, 230 P.3d 212, *review granted*, 169 Wn.2d 1017 (2010) and *State v. Tarhan*, 159 Wn. App. 819, 246 P.3d 580, *review granted*, 172 Wn.2d 1013 (2011). On March 1, 2011, our Supreme Court stayed consideration of a petition for review in *State v. Koss*, 158 Wn. App. 8,

Wn. App. at 652). The corollary of this is usually stated as a rule that this right does not include "hearing[s] on purely ministerial or legal issues that do not require the resolution of disputed facts." *Sadler*, 147 Wn. App. at 114. But, even assuming a link between the defendant's right to be present during critical stages of trial and the public trial right exists, we caution against an overbroad reading of case law suggesting that the two rights are coextensive.

As our Supreme Court has recently observed, under the federal constitution, a criminal "defendant has a right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge'" but "does not have a right to be present when his or her 'presence would be useless, or the benefit but a shadow.'" *State v. Irby*, 170 Wn.2d 874, 881, 246 P.3d 796 (2011) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-07, 54 S. Ct. 330, 78 L. Ed. 674 (1934), *overruled in part on other grounds sub nom. Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964)). For example, under the federal constitution a defendant has a right to be present during jury selection because "'it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether.'" *Irby*, 170 Wn.2d at 883 (quoting *Snyder*, 291 U.S. at 106).

In contrast, in 2005 our Supreme Court stated the defendant's public trial right in broader terms in that it "serves to ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." *State v.*

---

241 P.3d 415 (2010) pending its decision in *State v. Sublett*, 156 Wn. App. 160, 231 P.3d 231, *review granted*, 170 Wn.2d 1016 (2010). On January 4, 2012, our Supreme Court stayed consideration of Darrel Jackson's petition for review involving a public trial right issue in *State v. Smith*, 162 Wn. App. 833, 262 P.3d 72 (2011)—a case we consolidated on appeal—pending the court's decision in *Tarhan*. The law regarding a defendant's and the public's right to public trial proceedings is under scrutiny and continues to evolve as our Supreme Court addresses issues surrounding trial court closures.

Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005); *see also State v. Leyerle*, 158 Wn. App. 474, 479, 242 P.3d 921 (2010) (stating that the public trial right "ensure[s] a fair trial, foster[s] public understanding and trust in the judicial system, and give[s] judges the check of public scrutiny") (citing *Brightman*, 155 Wn.2d at 514; *Dreiling v. Jain*, 151 Wn.2d 900, 903-04, 93 P.3d 861 (2004)).

Recently, our Supreme Court also observed that the public's right encompasses circumstances where the public's presence "'plays a significant positive role in the functioning of the particular process,'" such as a criminal "trial or a hearing on a motion or other similar proceeding." *Tacoma News, Inc. v. Cayce*, 172 Wn.2d 58, 72-73, 256 P.3d 1179 (2011) (quoting *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). Further, as the United States Supreme Court has observed:

> The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.

Press-Enter. Co. v. Superior Court, 464 U.S. 501, 508, 104 S. Ct. 819, 78 L. Ed. 2d 629 (1984).

Although the defendant's right to be present and the defendant's and the public's right to an open and public trial serve the same normative value—i.e., ensuring a fair trial—they differ in function. The defendant's right to be present encompasses situations in which he may *actively* contribute to his own defense, such as offering his input to his counsel during jury selection and the exercise of preemptory challenges, as well as critical stages of trial where his presence "'has a

relation, reasonably substantial, to the fullness of his opportunity to defend against the charge,'" such as potentially convincing jurors to change their votes upon polling at the return of their verdict. *Irby*, 170 Wn.2d at 881 (quoting *Snyder*, 291 U.S. at 105-06); *see, e.g.*, *Irby*, 170 Wn.2d at 883; *State v. Rice*, 110 Wn.2d 577, 616, 757 P.2d 889 (1988); *see also Rice v. Wood*, 77 F.3d 1138, 1143 n.5 (9th Cir. 1996) (citing cases discussing the potential effect of the defendant's presence on the return of the verdict and jury polling). In contrast, the defendant's and the public's right to open and public trials also encompasses circumstances in which the public's mere presence *passively* contributes to the fairness of the proceedings, such as deterring deviations from established procedures, reminding the officers of the court of the importance of their functions, and subjecting judges to the check of public scrutiny. *See, e.g.*, *Brightman*, 155 Wn.2d at 514; *Leyerle*, 158 Wn. App. at 479.

Thus, even in proceedings involving purely legal matters, the public's presence may ensure the fairness of such proceedings, although the same cannot be said for ministerial or administrative matters that do not impact the defendant's rights.[6] *But see In re Det. of Ticeson*, 159 Wn. App.

[6] If the defendant's right to be present and the public trial right are coextensive, our Supreme Court has suggested that a defendant's right under the Washington constitution to "'appear and defend'" may be broader than a defendant's federal constitutional right to be present, *Irby*, 170 Wn.2d at 885 n.6 (quoting Wash. Const. art. I, § 22); by implication, that broader right would extend to the public. . Washington case law does not condition a criminal defendant's right to "'appear and defend' at a particular 'stage of trial' on what a defendant might do or gain by attending, or the extent to which the defendant's presence may have aided his defense." *Irby*, 170 Wn.2d at 885 n.6 (quoting *State v. Shutzler*, 82 Wash. 365, 367, 144 P. 284 (1914)). Rather, Washington law conditions the right "on the chance that a defendant's 'substantial rights may be affected' at that stage of trial." *Irby*, 170 Wn.2d at 885 n.6 (quoting *Shutzler*, 82 Wash. at 367). Accordingly, even if the defendant's right to be present and the public trial right are coextensive under Washington law, both may be broader than their corresponding federal constitutional rights and, arguably, encompass circumstances where the defendant's and the public's mere presence passively contribute to the proceedings or, indeed, serve no function in aiding the defendant's defense. *See Irby*, 170 Wn.2d at 885 n.6.

374, 383-86, 246 P.3d 550 (2011) (holding that Washington law historically supports in-chambers conferences on purely legal issues).

Sadler is broadly cited for the proposition that in-chambers conferences to discuss purely legal or ministerial matters do not implicate the right to open and public trials, but *Sadler* rejected the State's argument that a hearing on a *Batson*[7] challenge need not be held in public. 147 Wn. App. at 116-18. Consistent with our Supreme Court's statements about the defendant's and the public's right to public trials, we held that "[b]ecause a *Batson* hearing involves factual and credibility determinations *and is relevant to the fairness and integrity of the judicial process as a whole* . . . the right to public trial exists in this context." *Sadler*, 147 Wn. App. at 118 (emphasis added).

In *State v. Sublett*, 156 Wn. App. 160, 181-82, 231 P.3d 231, *review granted*, 170 Wn.2d 1016 (2010), we addressed whether an in-chambers conference to respond to a jury question that arose during deliberations about a particular jury instruction violated Sublett's public trial right. We observed that, "in general, in-chambers conferences between the court and counsel on legal matters are not critical stages of the proceedings except when the issues involve disputed facts." 156 Wn. App. at 183 (citing *In re Pers. Restraint of Lord*, 123 Wn.2d 296, 306, 868 P.2d 835, 870 P.2d 964 (1994). We agree with our Supreme Court, *Sadler*, and *Sublett*, and hold that there is no per se rule[8] that the issues raised during in-chambers conferences are not subject to public

[7] *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986).

[8] Division Three of this court addressed whether an in-chambers conference on jury instructions implicates a defendant's public trial right. *Koss*, 158 Wn. App. at 16-17. It held that the in-chambers conference addressed purely legal issues because it involved finalizing the jury instructions' language and did not involve disputed facts. *Koss*, 158 Wn. App. at 17. Furthermore, it observed that the defendant's failure to object to the instructions on the record following the chambers conference undermined his claim on appeal. *See Koss*, 158 Wn. App. at

scrutiny and the defendant's right to be present.

Here, we must address an in-chambers conference about jury instructions. The trial court recited on the record what occurred during the in-chambers conference: the trial court and the parties "had an opportunity to go over the instructions" and the instructions had "been copied and collated." 2 RP at 145. We need not resolve whether Bennett or the public had a right to observe a purely legal discussion relevant to Bennett's trial because our record fails to reveal that any issues, factual or legal, arose or were discussed.

We recognize that some chambers conferences on jury instructions may be ministerial or administrative—e.g., numbering the instructions, checking the order of the instructions, verifying their typographical accuracy, etc.—but there are occasions when disputed facts and evidence may be discussed in an effort to influence the trial court's choice of jury instructions, and other chambers discussions may take such discussions beyond purely ministerial or administrative matters. In the context of jury instructions, a trial court may be asked to rule on the effect of disputed testimony for the inclusion or exclusion of requested jury instructions—e.g., accomplice liability instructions, self-defense instructions, lesser included or lesser degree crimes, or diminished capacity instructions—or may be asked to interpret the law as applicable to the facts and evidence in the case.

In order to obtain effective review of an in-chambers conference, the parties should make an adequate record in the trial court about what transpired during any conference so we can determine whether the conference dealt with purely ministerial issues or involved discussion or resolution of disputed facts or legal issues. The record before us shows only that the trial court

17.

and the parties reviewed, copied, and collated the jury instructions, all administrative or ministerial functions. Furthermore, Bennett did not subsequently discuss nor object to the instructions in open court.[9] Thus, the record does not reflect that the in-chambers conference involved anything beyond purely ministerial matters that did not give rise to either Bennett's or the public's right to open proceedings. Accordingly, on this record, we hold that the trial court did not violate Bennett's or the public's right to an open and public trial.

School Bus Route Stop Sentencing Enhancement

Bennett additionally argues that the trial court erred by exceeding its statutory authority in imposing a school bus route stop sentence enhancement under former RCW 9.94A.533(6) (2008) on his conviction for methamphetamine delivery to a minor because such enhancements do not apply to convictions for methamphetamine delivery to a minor. We disagree.

Defendants may challenge an illegal or erroneous sentence for the first time on appeal. *State v. Bahl*, 164 Wn.2d 739, 744, 193 P.3d 678 (2008). We review questions of statutory interpretation de novo. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). When interpreting a statute, we seek to ascertain the legislature's intent. *Jacobs*, 154 Wn.2d at 600.

[9] Neither party designated the proposed jury instructions as part of the record on appeal so we cannot review whether there was any discussion about the choice of particular jury instructions. Moreover, the only record at trial about what occurred during the in-chambers conference was the trial court's recitation stated above. The better practice is for the parties and the trial court to hold these conferences in open court or to state on the record the nature of the in-chambers discussions, the specific issues discussed, and the results of in-chambers or sidebar conferences held at any point during a trial. *Ticeson*, 159 Wn. App. at 384 n.27. The burden on appeal is on Bennett to show a violation of either his or the public's right to open and public trials, e.g., that the public trial right applied to the particular issues discussed during an in-chambers conference. *See Smith*, 162 Wn. App. at 846 (holding that appellant failed to meet his burden of showing that the trial court violated his right to a public trial by sealing jury questionnaires used in open court during voir dire). Furthermore, appellants bear the burden of perfecting the record for appellate review, including the proposed jury instructions. *See* RAP 9.2(b). Thus, a complete absence of a record relating to the challenged action cannot compel appellate review.

Where a statute's meaning is plain on its face, we must give effect to that meaning as expressing the legislature's intent. *Jacobs*, 154 Wn.2d at 600. We determine the statute's plain meaning from the ordinary meaning of its language, as well as from the statute's general context, related provisions, and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600. We interpret statutes to give effect to all language in the statute and to render no portion meaningless or superfluous. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). We interpret statutes to harmonize them whenever possible. *State v. Powell*, 167 Wn.2d 672, 695-96, 223 P.3d 493 (2009).

RCW 69.50.401 provides:

> (1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.
>
> (2) Any person who violates this section with respect to:
>
> . . . .
>
> (b) Amphetamine, including its salts, isomers, and salts of isomers, or methamphetamine . . . is guilty of a class B felony.

RCW 69.50.406(1), the relevant delivery to a minor statute, provides:

> Any person eighteen years of age or over who *violates RCW 69.50.401* by distributing a controlled substance listed in Schedules I or II which is a narcotic drug or methamphetamine . . . to a person under eighteen years of age is guilty of a class A felony punishable by the fine authorized by RCW 69.50.401(2) (a) or (b), by a term of imprisonment of up to twice that authorized by RCW69.50.401(2) (a) or (b), or by both.

(Emphasis added.) Former RCW 9.94A.533(6) provided:

> *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 [former] 9.94A.605 [(2003)]. All enhancements under this subsection shall run consecutively to all other sentencing provisions, for all offenses sentenced under this chapter.

(Emphasis added.) Finally, RCW 69.50.435(1) provides:

> *Any person who violates RCW 69.50.401* by manufacturing, selling, delivering, or possessing with the intent to manufacture, sell, or deliver a controlled substance listed under RCW 69.50.401 or who violates RCW 69.50.410by selling for profit any controlled substance or counterfeit substance classified in schedule I, RCW 69.50.204, except leaves and flowering tops of marihuana to a person:
>
> . . . .
>
> (c) Within one thousand feet of a school bus route stop designated by the school district;
>
> . . . .
>
> may be punished by a fine of up to twice the fine otherwise authorized by this chapter, but not including twice the fine authorized by RCW 69.50.406, or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter, *but not including twice the imprisonment authorized by RCW 69.50.406*, or by both such fine and imprisonment. *The provisions of this section shall not operate to more than double the fine or imprisonment otherwise authorized by this chapter for an offense.*

(Emphasis added.)

Thus, by the statutes' plain language RCW 69.50.406(1) applies when a person "violates" RCW 69.50.401 by delivering a controlled substance to a minor, thus elevating the offense to a class A felony and allowing imposition of a sentence twice that authorized by RCW 69.50.401. Former RCW 9.94A.533(6) applies to "violation[s]" of RCW 69.50.435, and RCW 69.50.435(1) applies when a person "violates" RCW 69.50.401 within 1,000 feet of a school bus route stop.

The legislature expressly limited RCW 69.50.435(1)'s prohibition on more than doubling fines or imprisonment "*authorized by this chapter* for an offense." (Emphasis added.) RCW 69.50.435(1) does not reference any prohibition on sentence enhancements under chapters other than chapter 69.50 RCW, such as former RCW 9.94A.533(6) that is at issue here.

Were we to interpret this portion of RCW 69.50.435(1) otherwise, it would prohibit imposition of the mandatory school bus route stop enhancement under former RCW 9.94A.533(6), thus bringing the two statutes into conflict. But we harmonize statutes whenever

possible. *Powell*, 167 Wn.2d at 695-96. Accordingly, former RCW 9.94A.533(6)'s school bus route stop enhancement is unaffected by RCW 69.50.435(1)'s limitation on sentence doubling.

In sum, a person violates RCW 69.50.435(1) by violating RCW 69.50.401 within 1,000 feet of a school bus route stop. Because Bennett violated RCW 69.50.435(1) by delivering methamphetamine to Hensley within 1,000 feet of a school bus route stop, former RCW 9.94A.533(6) required imposition of a 24-month sentence enhancement. The trial court did not err in doing so, and Bennett's claim fails.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Sufficiency of the Evidence

Penfield testified that she was familiar with the sight and smell of methamphetamine and had previously smoked it through a glass pipe. According to her, neither she nor Hensley took methamphetamine pipes to Bennett's residence. At Bennett's house, he led them upstairs to his bedroom, where he produced a bag of methamphetamine and retrieved a glass methamphetamine pipe from the top dresser drawer, near his bed and computer. Penfield observed two methamphetamine pipes in Bennett's dresser drawer. After loading the pipe, Bennett, Penfield, and Hensley smoked from it, passing it from person to person five times. Then they all went down to Bennett's basement and, in what Penfield described as a "festive" atmosphere, began dancing, talking, and "hav[ing] fun." 1 RP at 94. Eventually, Bennett produced more methamphetamine and another pipe, which resembled one of the pipes in his dresser drawer, and the three again smoked methamphetamine together.

According to Bennett, he did not have methamphetamine or methamphetamine pipes at his house before Penfield and Hensley arrived. Hensley provided the methamphetamine, and Bennett did not recall whose pipes they used. He admitted smoking methamphetamine with Penfield and Hensley in his bedroom, but he did not recall smoking it in his basement.

According to Daniel Stone, he and Hensley went to Bennett's residence on the night of November 21, 2008, and consumed shots of tequila and rum that Bennett supplied in his basement.

On November 22, Centralia Police Department Detective Patrick Beall spoke with Stone and Hensley. On November 23, law enforcement officers executed a search warrant at Bennett's residence. One officer photographed the search of Bennett's bedroom and basement.

An officer discovered two frosted-over glass pipes in the top dresser drawer and one frosted-over glass pipe next to Bennett's bed; the officer, based on his training and experience, identified the pipes as having been used to smoke methamphetamine. The trace residue within these three pipes later tested positive for methamphetamine. The officer also discovered an unused glass pipe in the room and a can of butane on top of the dresser, which he identified as commonly being used to heat up the glass "bowl" portion of pipes while smoking methamphetamine. 2 RP at 59-60. Other than the three used pipes containing trace methamphetamine residue, the officers recovered no drugs at Bennett's residence.

In the basement, an officer discovered bottles of tequila and rum. The officers discovered a bottle of Jägermeister on the dining room table. Beall twice interviewed Bennett. During the first interview, Bennett admitted that on the night of November 21, he, Hensley, and Stone had taken shots of rum, tequila, and Jägermeister together, and that he knew Hensley was under the

age of 21 at the time. During the second interview, Bennett said he could not recall whether he had smoked methamphetamine with Hensley and Penfield on another occasion. During the same interview, however, he later admitted he had smoked methamphetamine with Hensley and Penfield in his bedroom.

Bennett argues that the evidence was insufficient to support his conviction for methamphetamine delivery to a minor because the State failed to prove that Bennett personally passed the methamphetamine pipe to Hensley and the jury was not instructed on accomplice liability. The State counters that Bennett constructively delivered the methamphetamine to Hensley. We agree with the State.

1. Methamphetamine Delivery to a Minor

"A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Sufficient evidence supports a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime proved beyond a reasonable doubt. *State v. Hosier*, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). On appeal, we draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. *Hosier*, 157 Wn.2d at 8. In the sufficiency context, we consider circumstantial evidence as probative as direct evidence. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.3d 410 (2004). We may infer specific criminal intent of the accused from conduct that plainly indicates such intent as a matter of logical probability. *Goodman*, 150 Wn.2d at 781. We defer to the fact finder on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004),

abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

Jury instruction 7 provided, "Deliver or delivery means the actual or constructive transfer of a controlled substance from one person to another." Supplemental Clerk's Papers at 40. RCW 69.50.101(2)(f) provides that "'[d]eliver' or 'delivery,' means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship." We have previously used common dictionary meanings to interpret "'transfer'" to mean "'to cause to pass from one person or thing to another,' as well as 'to carry or take from one person or place to another.'" *State v. Martinez*, 123 Wn. App. 841, 846-47, 99 P.3d 418 (2004) (internal quotation marks omitted) (quoting *State v. Campbell*, 59 Wn. App. 61, 64, 795 P.2d 750 (1990)). We have also defined "'[c]onstructive delivery'" as "the transfer of a controlled substance belonging to the defendant or under the defendant's control, by some other person or manner at the instance and direction of the defendant.'" *Martinez*, 123 Wn. App. at 846 n.8; *see also Campbell*, 59 Wn. App. at 63 (stating the same). Jury instruction 13 instructed the jury on an unwitting possession affirmative defense.

Here, Penfield testified that the methamphetamine belonged to Bennett and that he provided it for them to smoke. Thus, the jury could reasonably conclude that Bennett owned and controlled the methamphetamine. Penfield also testified that she and Hensley went to Bennett's residence hoping to smoke methamphetamine, and that the three of them began smoking it and passed the methamphetamine pipe from person to person five times. Thus, a jury could also reasonably conclude as a matter of logical probability that, even if Bennett did not hand the pipe to Hensley, he intended for Penfield to pass it to Hensley, which she did. *See Goodman*, 150

Wn.2d at 781. Any contrary testimony or evidence was a credibility issue the jury resolved against Bennett. *Thomas*, 150 Wn.2d at 874-75. Accordingly, when viewed in the light most favorable to the State, we hold that sufficient evidence supports Bennett's conviction for methamphetamine delivery to a minor, and his claims fail.

2. Methamphetamine Possession

Bennett also argues that the evidence is insufficient to support his unlawful possession of methamphetamine conviction. He argues that we should exercise our "power to recognize common law elements of an offense or even to create defenses" and require a "measurable amount" of the controlled substance as a common law element of a possession offense and, thus, we should hold that a conviction may not be based on trace amounts or residue of a controlled substance. Br. of Appellant at 14-16. To hold otherwise, Bennett contends, would lead to the "unduly harsh" result of making Washington the only state "to impose criminal liability for [unlawful possession of residue or] *de minimis* possession without proof of knowledge." Br. of Appellant at 13. He concludes that evidence of possession of only methamphetamine residue is insufficient to support a possession conviction. We disagree.

Bennett's challenge initially requires statutory interpretation. We review questions of statutory interpretation de novo. *Jacobs*, 154 Wn.2d at 600. When interpreting a statute, we seek to ascertain the legislature's intent. *Jacobs*, 154 Wn.2d at 600. Where a statute's meaning is plain on its face, we must give effect to that meaning as expressing the legislature's intent. *Jacobs*, 154 Wn.2d at 600. We determine the statute's plain meaning from the ordinary meaning of its language, as well as from the statute's general context, related provisions, and the statutory scheme as a whole. *Jacobs*, 154 Wn.2d at 600. When a statute is unambiguous, we may not add

words or clauses that the legislature has chosen not to include. *J.P.*, 149 Wn.2d at 450.

RCW 69.50.4013(1) provides, "It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter." Our Supreme Court has held that, by its plain language, the possession statute does not contain a knowledge element and has refused to imply such an element. *State v. Bradshaw*, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004). But Washington recognizes an unwitting possession affirmative defense to "ameliorate[] the harshness of [the] strict liability crime." *Bradshaw*, 152 Wn.2d at 538.

Similarly, it is unambiguous that the plain language of RCW 69.50.4013 does not contain a "measurable amount" element; thus, we are constrained from adding one. *J.P.*, 149 Wn.2d at 450. Even were we not so constrained, Washington's recognition of an unwitting possession defense "alleviates any concern that a person could be convicted for quantities of a controlled substance that were so small that the person could not have been aware they possessed a controlled substance." Br. of Resp't at 13. Contrary to Bennett's claim, Washington law does allow evidence of knowledge, or the lack thereof. That Washington law currently places the burden of proof of knowledge on defendants is a matter properly addressed to the legislature, not the courts.

Accordingly, in the absence of a "measurable amount" element in RCW 69.50.4013, it was unlawful for Bennett to possess any amount of methamphetamine, including residue. *See State v. Rowell*, 138 Wn. App. 780, 786, 158 P.3d 1248 (2007); *State v. Malone*, 72 Wn. App. 429, 438-440, 864 P.2d 990 (1994). Here, Bennett possessed glass pipes that tested positive for

methamphetamine residue. Sufficient evidence supports his methamphetamine possession conviction, and this claim fails.

Admission of Photographic Evidence

At trial and outside the jury's presence, Bennett objected to three photographs of his basement that the State planned to offer into evidence. He argued that the photographs showed the basement walls covered with pictures of nude women, which was irrelevant, prejudicial, and cumulative, and that the State was trying to "paint [him] in a certain light." 1 RP at 79. The State argued that it intended to offer the photographs to corroborate Penfield's and Stone's testimony about the basement's appearance on the nights in question and to show the basement's "festive or party type setting or atmosphere." 1 RP at 80. The trial court ruled:

> [A]s long as the pictures accurately depict what the witness[es] will describe as being the situation or the atmosphere in the basement, where they smoked methamphetamine, I don't see how they are not relevant or how they are not material to what's being presented, and I don't think the mere fact that this stuff is on the wall in and of itself is so inflammatory to justify keeping them out.
>
> As I said earlier it's not against the law. You can have a 20 foot high mural of a nude body painted on the wall of your bedroom if you wanted to and it's not against the law to do that. It just all depends on what your taste is. If that's what you want to do, that's what you do.

1 RP at 81-82.

After Penfield testified that the basement contained "pictures of women, pictures of all of [Bennett's] friends that he took down there, strobe lights, [and] his guitar," the trial court admitted the photographs over Bennett's renewed objection. 1 RP at 88-89. The photographs were consistent with Penfield's testimony. The trial court also admitted, without objection and after Penfield identified them, photographs of Bennett's bedroom, of the two pipes recovered from the dresser drawer, and of Penfield, Hensley, and Bennett in the basement on the night they smoked methamphetamine together. Stone also identified the photographs depicting the basement and photographs of him with Hensley and Bennett in the basement on November 21.

Bennett argues that the trial court abused its discretion in admitting the three photographs of his basement under ER 404(b) and ER 403 because they showed the pictures of nude women on the basement's wall. The State contends that the trial court did not abuse its discretion because the photographs did not implicate ER 404(b) and the trial court correctly determined that their probative value outweighed any prejudicial effect under ER 403. We agree with the State.

We review the trial court's evidentiary rulings for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009).

1. ER 404(b)

ER 404(b) provides, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." First, as the trial court observed, the photographs were not illegal nor were they evidence of other wrongs or acts. Thus, they were not subject to ER 404(b) scrutiny. Furthermore, the record reflects that the State did not seek to admit the photographs as evidence of Bennett's character but sought to admit them to corroborate Penfield's and Stone's testimony describing the basement and to depict the "festive" appearance of the basement on the nights in question. 1 RP at 78-80. Accordingly, the photographs did not implicate ER 404(b), and Bennett's claim fails.

2. ER 403

ER 403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of

cumulative evidence." ER 402 provides, "All relevant evidence is admissible, except as limited by . . . these rules." ER 401 defines "'[r]elevant evidence'" as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

Here, the photographs were relevant to corroborate Penfield's and Stone's testimony about the basement's appearance and atmosphere. The photographs were not cumulative, as they corroborated different details of Penfield's and Stone's testimony, such as the pictures of nude women and friends on the walls and the presence of a guitar. Further, as the trial court recognized, the photographs did not depict anything illegal. Because the trial court admitted the three photographs based on tenable reasons, it did not abuse its discretion and Bennett's claim fails.

Double Jeopardy

After Bennett unsuccessfully moved on double jeopardy grounds for merger of his methamphetamine possession conviction with either delivery conviction, the trial court sentenced him to 96 months' imprisonment. Bennett now further argues that his convictions for methamphetamine delivery to a minor, methamphetamine delivery, and unlawful methamphetamine possession violated protections against double jeopardy under the federal and state constitutions because the convictions were based on the same acts. We again disagree.

We review double jeopardy claims de novo. *State v. Knight*, 162 Wn.2d 806, 810, 174 P.3d 1167 (2008). Our state constitution provides, "No person shall . . . be twice put in jeopardy for the same offense." Wash. Const. art. I, § 9; *accord*, U.S. Const. amend. V. If double jeopardy results from a conviction for more than one crime, the remedy is vacation of the lesser

offense. *State v. Weber*, 159 Wn.2d 252, 265, 269, 149 P.3d 646 (2006).

When the relevant statutes do not expressly disclose legislative intent to treat the charged crimes as the same offense, we determine whether the charged crimes are the same in law and fact. This is known as the *Blockburger* test. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); *In re Pers. Restraint of Orange*, 152 Wn.2d 795, 816-17, 100 P.3d 291 (2004).

The *Blockburger* test is a rule of statutory construction used to discern legislative purpose. *State v. Calle*, 125 Wn.2d 769, 778, 888 P.2d 155 (1995). We must answer two questions—whether the two charged crimes arose from the same act and, if so, whether the evidence supporting conviction of one crime was sufficient to support conviction of the other crime. *Orange*, 152 Wn.2d at 820. "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger*, 284 U.S. at 304. We view the offenses as they were charged, not in the abstract. *In re Pers. Restraint of Francis*, 170 Wn.2d 517, 523-24, 242 P.3d 866 (2010).

1. Delivery Convictions

Bennett, citing *State v. Marchi*, 158 Wn. App. 823, 829, 243 P.3d 556 (2010), *review denied*, 171 Wn.2d 1020 (2011), argues that his delivery of methamphetamine to a minor and delivery of methamphetamine convictions arose from the same act. But in *Marchi*, we held that Marchi's convictions arose from the same act because they involved poisoning the same victim on the same occasion. 158 Wn. App. at 830. In contrast, here the State charged Bennett with

delivering methamphetamine to a minor, Hensley, and delivering methamphetamine to Penfield, i.e., different recipients on the same occasion. The two charged delivery offenses involved deliveries to two different people, i.e., separate acts. Bennett's convictions for delivery do not violate double jeopardy, and his claim fails.

2. Delivery Convictions and Possession Conviction

Bennett also argues that his convictions for methamphetamine delivery to Hensley and Penfield and his methamphetamine possession conviction violate double jeopardy. But the dates of the charged delivery offenses were between November 1 and November 20, 2008. The methamphetamine possession charge was for conduct occurring on November 23, 2008. Thus, the charged crimes arose from separate acts, i.e., Bennett's methamphetamine delivery on one date and Bennett's methamphetamine possession on a subsequent date. Thus, his convictions do not violate double jeopardy, and his claim fails.

Offender Score

Bennett argues that the trial court abused its discretion by not considering whether his convictions for methamphetamine delivery to a minor and methamphetamine delivery constituted the same criminal conduct for purposes of calculating his offender score. We do not review his challenge on this issue because he failed to preserve it below.

We review the trial court's same criminal conduct determinations for abuse of discretion. *State v. Haddock*, 141 Wn.2d 103, 110, 3 P.3d 733 (2000). Generally, the failure to challenge an offender score calculation fails to preserve the issue "'where the alleged error involves a matter of trial court discretion.'" *State v. Wilson*, 170 Wn.2d 682, 689, 244 P.3d 950 (2010) (quoting *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 874, 50 P.3d 618 (2002)). Here, Bennett failed to

challenge his offender score calculation on same criminal conduct grounds before the trial court. Accordingly, he failed to preserve his direct challenge on this issue.

Ineffective Assistance of Counsel

Bennett's final argument is that his right to effective assistance of counsel under both the state and federal constitutions was violated because defense counsel failed to argue that Bennett's two delivery convictions constituted the same criminal conduct. This claim fails.

We review claims of ineffective assistance of counsel de novo. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To prevail on an ineffective assistance of counsel claim, the defendant must show that defense counsel's objectively deficient performance prejudiced him. *McFarland*, 127 Wn.2d at 334-35. We strongly presume that counsel is effective and the defendant must show no legitimate strategic or tactical reason supporting defense counsel's actions. *McFarland*, 127 Wn.2d at 335-36. To demonstrate prejudice, the defendant must show a reasonable probability exists that, absent trial counsel's inadequate performance, the proceeding would have resulted in a different outcome. *McFarland*, 127 Wn.2d at 335. A failure to demonstrate either deficient performance or prejudice defeats an ineffective assistance claim. *See McFarland*, 127 Wn.2d at 334-35; *see also Strickland v. Washington*, 466 U.S. 668, 700, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

We ultimately review a trial court's same criminal conduct determination for abuse of discretion. *Haddock*, 141 Wn.2d at 110. Discretion exercised in violation of a statute is untenable and amounts to an abuse of discretion. *Council House, Inc. v. Hawk*, 136 Wn. App. 153, 159, 161-62, 147 P.3d 1305 (2006); *State v. Rundquist*, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). We review issues of statutory interpretation de novo. *Jacobs*, 154 Wn.2d at 600.

When the trial court sentences a defendant for multiple current offenses, it should treat the offenses as one crime for offender scoring purposes if it determines that the multiple offenses

constitute the same criminal conduct. RCW 9.94A.589(1)(a). "'Same criminal conduct'" means "two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim." RCW 9.94A.589(1)(a). If any of these elements are missing, the offenses do not constitute the same criminal conduct. *Haddock*, 141 Wn.2d at 110.

The victim of delivery of a controlled substance is generally "the public at large." *State v. Garza-Villarreal*, 123 Wn.2d 42, 45, 47, 864 P.2d 1378 (1993). But in *State v. Vanoli*, 86 Wn. App. 643, 651-52, 937 P.2d 1166 (1997), Division One of this court considered whether the crime of delivery of a controlled substance to a minor has a different victim. It observed:

> [T]he purpose of the age enhancement statute, RCW 69.50.406, is to punish not just deliveries but deliveries to *minors*. The enactment of this special statute to separately address deliveries of drugs to minors, and the statute's provision for enhanced penalties for such deliveries, demonstrates the Legislature's recognition that minors are indeed victims, as well as participants, when they are given illegal drugs.

Vanoli, 86 Wn. App. at 651-52.

We find *Vanoli* persuasive. Accordingly, the victim of Bennett's methamphetamine delivery to Penfield, a non-minor, was the general public. But the victim of Bennett's delivery to Hensley, a minor, was both the public and Hensley herself. Because the offenses involved different victims, they did not constitute the same criminal conduct, and Bennett was not prejudiced by defense counsel's failure to argue such. He fails to demonstrate ineffective

assistance of counsel, and his claim fails.

We affirm Bennett's convictions.

Van Deren, J.

We concur:

Armstrong, J.

Worswick, A.C.J.