IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. TONY KIM WHITE, Appellant.	No. 41579-8-II UNPUBLISHED OPINION

Hunt, J. — Tony Kim White appeals his jury convictions for unlawful delivery of cocaine (Count I); unlawful possession of cocaine with intent to deliver (Count II); unlawful use of a building for drug purposes (Count III); and unlawful possession of 40 grams or less of marijuana (Count IV). He also appeals the school bus stop sentencing enhancements on counts I and II. In his Statement of Additional Grounds (SAG), he raises 21 other issues. White argues that we should reverse his convictions because the prosecutor's "missing witness" argument at closing improperly shifted the burden of proof. With respect to his special sentencing enhancements, White argues that (1) *Bashaw*[1] jury instruction errors require reversal of both enhancements; (2) in the alternative, his counsel rendered ineffective assistance in failing to object to the jury

[1] *State v Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), *overruled by State v. Guzman Nu•ez*, 174 Wn.2d 707, ___ P.3d ___ (2012).

instructions, which also requires reversal of both enhancements; and (3) we should reverse the school bus stop enhancement on Count II because the jury's special verdict did not find that the crime occurred within 1,000 feet of a school bus stop. We affirm White's convictions and the special sentencing enhancement on Count I. We reverse the school bus stop sentencing enhancement on Count II and remand for resentencing.

FACTS

I. Drug Delivery and Possession

On January 19, 2010, Detective Ray Shaviri, Deputy Kory Shaffer, and a confidential informant (CI) discussed engaging in a "controlled [drug] buy"[2] from Tony White, who had invited the CI to purchase crack cocaine from him. 1 Verbatim Report of Proceedings (VRP) at 24. After Shaffer searched the CI, they issued him recorded money to complete the controlled buy. Shaviri drove the CI to a duplex at 5422 South Alder Street in Tacoma and watched him enter the residence. After a few minutes, the CI exited, came straight to Shaviri's car, told Shaffer that he had bought the crack cocaine from "Tony," and gave the detectives the drugs he had purchased inside the residence; the drugs field tested positive for crack cocaine. 2 VRP at 242. Shaviri and Shaffer again searched the CI. The CI described "Tony" as an Asian male in his 30s with a ponytail and black hair.[3] 3 VRP at 274.

[2] The CI was engaged in the second of two "reliability" buys, in which the detectives determine the competency and credibility of a confidential informant. 1 VRP at 71. The CI was a "contract informant," someone who enters into a written contract with the prosecutor's office after "get[ting] in trouble." 1 VRP at 35.

[3] Later in court, Tony White had a ponytail and his judgment and sentence identified him as an "Asian/Pacific Islander" and showed he was 38 years old at sentencing. Clerk's Papers (CP) at 100.

On February 17, Shaffer and approximately 10 other officers executed a search warrant on White's two-bedroom apartment at 5422 South Alder Street.[4] One officer shouted, "Police. Search warrant. Open the door." 2 VRP at 247. After 10 or 15 seconds without a response, the police breached the reinforced door. Inside, they saw White come out of one of the bedrooms. In addition to White, police encountered three other people: James Marlow, Sheila McCully, and Charles Williams. Police secured all these individuals inside the residence.

Shaffer read *Miranda*[5] rights to White, who did not appear to be under the influence of drugs or alcohol. White voluntarily told Shaffer that (1) he (White) stayed in a room at the residence; (2) a woman named McCully also lived at the residence; (3) White's former roommate, Misty Navensken, had sold crack out of the house but had moved out a couple of weeks earlier; (4) he (White) had not sold crack at the residence; and (5) he had marijuana and prescription cold pills on his person. Shaffer found marijuana in White's pants pocket. Police also found White's wallet and identification card "[o]n his person." 2 VRP at 175.

In the northeast bedroom, officers found White's insurance card, a receipt listing White's name and address at 5422 South Alder, a letter addressed to White at 5422 South Alder, a red plastic container with cocaine residue, a plastic "baggie" with white residue, a bag containing 6 smaller bags with a combined total of 43 grams of crack cocaine,[6] a sandwich "baggie" containing

[4] Although White's landlord had given him notice to vacate, White was still living at this apartment and had paid rent through the month of February.

[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

[6] Forty-three grams of crack cocaine are worth about $4,300, broken down into individual grams. This amount is not consistent with personal use.

crack cocaine, a notebook containing "crib notes"[7] with Navensken's name on the cover, and a surveillance monitor connected to a camera mounted above the front door. 2 VRP at 117, 118, 3 VRP at 326. There was another surveillance camera at the top of the stairs to the apartment. In the living room, officers found an open box of sandwich "baggies" and two crack pipes. 2 VRP at 117, 333.

Shaffer and another deputy measured 881 feet between the sidewalk leading to White's 5422 South Alder apartment front door and the nearest school bus stop. Shaffer estimated that the house was situated 15 feet back from the front property line and that it was 25 or 30 feet tall and 30 to 40 feet deep. Tacoma School District software also showed that White's residence was within 1,000 feet of a school bus stop.

II. Procedure

The State charged White with (1) unlawful delivery of cocaine on January 19, 2010, with a sentencing enhancement for delivering within 1000 feet of a school bus stop; (2) unlawful possession of cocaine with intent to deliver on February 17, 2010, also with a school bus stop enhancement; (3) unlawful use of a building for drug purposes on February 17, 2010; and (4) unlawful possession of 40 grams or less of marijuana on February 17, 2010.

White testified that, at times, as many as four people were living at the 5422 South Alder apartment, including Navensken. When the police executed the search warrant, he (White) was in

[7] "Crib notes" are "sort of like a ledger for a drug dealer," listing how much money is owed and who bought what amount of drugs from the dealer. 3 VRP at 332. Multiple people apparently wrote these crib notes, which included names with numbers written below the names. The name Sean Larson, whose identification card the officers found in the same bedroom, appears in the notes around 10 times. White's name does not appear anywhere in these notes.

the process of moving out of the apartment, and Danielle Sears and Randy Baker were occupying the northeast bedroom. White denied ever seeing the cocaine found in the northeast bedroom. White also denied that he had sold drugs to the CI on January 19, 2010.

White claimed that he had not been in his apartment that day; instead, he had received a ride to Tukwila from his friend Vernel Rucks, so that he could make a car payment. White also testified, however, that he had been fixing his truck from noon on January 19 until 12:30 am on January 20, at some place other than his residence. Despite having known about the criminal charges against him for months and having seen Rucks almost every day for the past four years, White did not call him as a witness. The State requested a missing witness jury instruction. When White objected, the trial court denied the missing witness instruction request.

The State then asked, "I assume that the court is—a missing witness instruction essentially tells the jury what they can glean from such information. I assume that the court is not precluding me from arguing that that witness is not here." 4 VRP at 452-53. The court responded,

> Correct. And you can certainly say that, you know, they're entitled to judge his credibility, his version. Just be cautious to not be in a position where you are impliedly shifting the burden to the defendant.

4 VRP at 453. White did not object to the trial court's allowing the State to make this argument in closing.

Nevertheless, during its initial closing argument, the State did not mention the missing witness in connection with White's credibility. But during his closing, White argued that he had not been home at the time of the January 19 controlled buy, Count I. Only then did the State, in rebuttal, urge jurors, when determining White's credibility as a witness, to consider that (1) White

did not call Rucks to corroborate his story about being having been away the morning of January 19, and (2) White did not call any witnesses to corroborate his story about having fixed his truck from noon on January 19 until 12:30 the next morning. White did not object.

The jury found White guilty of all counts[8]; it also found that he had committed Count I within 1,000 feet of a school bus stop. Count II's special verdict form, however, contained the question, "Did the defendant possess a controlled substance with intent to deliver the controlled substance *at any location*?" to which the jury answered, "Yes." CP at 82A (emphasis added). Apparently the jury was not given and, thus, did not answer a special verdict question about whether White had committed Count II within 1,000 feet of a school bus stop.

White's offender score was six. The trial court sentenced him to a total of 128 months in confinement, 80 months of which resulted from concurrent sentences for Counts I, II, and III and 48 months of which resulted from consecutive 24-month sentences for the two special sentencing enhancements on Counts I and II. The 90-day sentence for Count IV ran consecutively to the two concurrent 80-month sentences for Counts I and II and to the concurrent 24-month sentence for Count III. White appeals his convictions, sentencing, and his sentencing enhancements on Counts I and II.

[8] Although the record is unclear whether White pleaded guilty to Count IV, the record shows that a jury found him guilty of Count IV. Furthermore, at closing White did not assert his innocence of Count IV. After admitting that marijuana was found on his person, White argued in closing, "I would ask [you to find] not guilty on Count IV, but the evidence is what it is." 4 VRP at 504.

ANALYSIS

I. Prosecutorial Misconduct

White argues that (1) the trial court erred in allowing the State to include his missing witness in its closing argument about his credibility because such inference did not apply and the trial court had given no missing witness jury instruction; and (2) the State's missing witness argument improperly shifted the burden of proof, "use[d] White's failure to present evidence as 'evidence' that White lacked credibility in denying his guilt," violated White's constitutional rights, and was not harmless beyond a reasonable doubt. Br. of Appellant at 23. We hold that error, if any, was harmless.

Assuming, without deciding, that the State's closing argument was improper misconduct, White is not entitled to reversal of his convictions because he does not show prejudice. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012). In *Emery* our Supreme Court relied on the following four factors to determine that the defendant could not have shown that the State's burden-shifting statements had a substantial likelihood of affecting the jury's verdict: (1) the prosecutor clearly and repeatedly stated the correct burden of proof; (2) the statements were limited to nine sentences at the end of an eight-day trial and did not permeate the trial; (3) the State's case was "very strong"; and (4) the trial court's jury instructions stated the proper burden of proof. *Emery*, 174 Wn.2d at 764 n.14.

Here, as in *Emery*, even if the prosecutor's comments potentially shifted the burden of proof, White does not show a substantial likelihood that the comments affected the jury's verdict. First, the prosecutor emphasized multiple times that the State had the burden of proof. Second,

the challenged comments were limited to 14 sentences in rebuttal closing argument at the end of a 4-day trial, and they prompted no objection by White at the time. Third, the State offered strong evidence for Counts II, III, and IV, which counts were unrelated to White's whereabouts on January 19, 2010.

The State's evidence was also strong for Count I, unlawful delivery of cocaine on January 19, 2010, the only count to which White's whereabouts on January 19 was relevant. The CI testified that he had purchased cocaine from White and had told Deputy Shaffer immediately after the purchase that "[he] got it from Tony." 2 VRP at 242. Shaffer testified that White was the actual target of the controlled buy after he had invited the CI to purchase crack from him. Shaffer also had searched the CI both before and after the controlled buy; and Detective Shaviri had watched the CI enter White's apartment.

Furthermore, the trial court's standard instructions reminded the jury that (1) "lawyers' statements are not evidence,"[9] (2) "[t]he evidence is the testimony and the exhibits,"[10] and (3) "[t]he defendant has no burden of proving that a reasonable doubt exists."[11] We presume that the jury followed the trial court's instructions. *See Emery*, 174 Wn.2d at 764 n.14; *State v. Hopson*, 113 Wn.2d 273, 287, 778 P.2d 1014 (1989). White, like Emery, fails to establish the four factors necessary to show prejudice[12] or a substantial likelihood that the prosecutor's statements affected

[9] CP at 14 (Instruction 1).

[10] CP at 14 (Instruction 1).

[11] CP at 17 (Instruction 3).

[12] *Emery*, 174 Wn.2d at 764 n.14.

the jury's verdict. Therefore, because error, if any, was harmless beyond a reasonable doubt, White's prosecutorial misconduct argument fails.

II. Count II Special Verdict Sentence Enhancement

White argues that the sentencing court exceeded its authority by imposing a school bus stop enhancement for Count II because the jury did not find on its special verdict form that the crime occurred within 1,000 feet of a school bus stop. The State counters that any error was harmless beyond a reasonable doubt because the State proved the school bus stop enhancement with uncontroverted evidence. We agree with White.

"[F]ailure to submit a sentencing factor to a jury for a finding . . . violates a defendant's right to a jury trial under both the federal and state constitutions." *State v. Williams-Walker*, 167 Wn.2d 889, 897, 225 P.3d 913 (2010). Here, the special verdict for Count II did not include a question for the jury to answer or a blank for the jury to find that the drug possession occurred within 1,000 feet of a school bus stop. Instead, the special verdict form asked the jury to answer only whether the defendant possessed "a controlled substance with intent to deliver the controlled substance *at any location*." CP at 82A (emphasis added). Despite the substantial evidence introduced at trial that the act in Count II occurred within 1,000 feet of a school bus stop, the jury was not asked to return a special verdict on this issue; therefore, there was no jury finding on which the trial court could predicate an enhanced sentence on Count II for having committed the act within 1,000 feet of a school bus stop. *Williams-Walker*, 167 Wn.2d at 897, 901.[13]

[13] In *Walker-Williams*, our Supreme Court also held that sentences based on improper special verdicts "occur[] during sentencing, not in the jury's determination of guilt. Thus, . . . because the trial courts' errors occurred after the jury verdicts were reached, the harmless error doctrine does not apply." *Williams-Walker*, 167 Wn.2d at 901. Contrary to the State's suggestion,

Accordingly, we reverse the sentencing enhancement on Count II.

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therefore, we do not apply the harmless error doctrine.

III. Count I Special Verdict Sentence Enhancement; "*Bashaw*" Error

Because we reverse the special sentencing enhancement for Count II on independent grounds, we consider White's alternative *Bashaw* argument with respect to only Count I. He argues that the jury instruction for his school bus stop enhancements was error under *Bashaw* and that his counsel was ineffective in failing to object to the erroneous instruction. This argument fails.

Our Supreme Court recently reconsidered *Bashaw* and determined that its "nonunanimity rule" for aggravating sentencing enhancements "cannot stand" because it "conflicts with statutory authority, causes needless confusion, does not serve the policies that gave rise to it, and frustrates the purpose of jury unanimity." *State v. Guzman Nu•ez*, 174 Wn.2d 707, 709-10, 718, ___P.3d ___, (2012) (overruling "*Goldberg*[14] and the portion of *Bashaw* adopting the nonunanimity rule for aggravating circumstances."). Under *Guzman Nu•ez*, the school-bus-stop special enhancement instruction here was not error.

Because the instruction was not error, White also cannot show that failure to object to it was deficient performance under the first prong of the ineffective assistance of counsel test. *See State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Accordingly, we need not address the second, prejudice prong of the test. White's claims fail.

[14] *State v. Goldberg*, 149 Wn.2d 888, 894, 72 P.3d 1083 (2003), *overruled by Guzman Nu•ez.*

IV. Statement of Additional Grounds

White asserts 21 errors in his SAG. We address each by number, clustering them where appropriate. All fail.

1. Sentencing: White first asserts that the trial court erred at sentencing because (1) unlawful possession of controlled substance with an intent to deliver ("UPCSWID") conspiracy is a "non-ranked" felony and cannot be used to increase the offender score for a class B felony; (2) his class C felony cannot be used to increase the offender score for a class B felony; and (3) the sentencing court failed to count three prior drug crimes, sentenced on the same day, as the same offense under RCW 9.94A.525(5)(a)(ii).[15] SAG at 1.

UPCSWID is a class B felony;[16] therefore, the trial court properly used the class B felony to compute the offender score. RCW 9.94A.525(2)(b). Since his release from confinement for his UPCSWID conviction, White had not spent 10 consecutive years in the community without committing a crime that later resulted in a conviction. *See* former RCW 9.94A.525(2)(b) (2010). Thus, his prior unlawful possession of controlled substance, a class C felony, could be used to increase his offender score because he apparently had not "spent five consecutive years in the community without committing any crime that subsequently result[ed] in a conviction." Former RCW 9.94A.525(2)(c).

2. Sentencing Enhancements: White next argues that his sentencing enhancements should

[15] Former RCW 9.94A.525(5)(a)(ii) applies to convictions for offenses committed before July 1, 1986; thus, it is inapplicable because White did not commit any of his offenses before that date.

[16] RCW 69.50.401(1), (2)(a).

have run concurrently, instead of consecutively, because the underlying sentences ran concurrently. White misapprehends the law. Former RCW 9.94A.533(6) (2009) requires school bus stop enhancements to run consecutively to all other sentencing provisions. *In re Postsentencing Review of Gutierrez*, 146 Wn. App. 151, 155-56, 188 P.3d 546 (2008). The trial court correctly ran the school bus stop sentence enhancements for Count I and II consecutively.

3. Judgment and Sentence for Count IV: White argues that the separate judgment and sentence for Count IV, possession of 40 grams or less of marijuana, is invalid because (1) it states the matter came before a hearing in open court on November 19, 2010, although it was actually heard on December 3, 2010; (2) it states that White is "guilty by jury" and also by "plea of guilty"; and (3) it was written on a form bearing the words "[c]onditions of [s]uspended [s]entence" in a footer at the bottom of the form, not on a regular judgment and sentence form like the one used for the other three counts. SAG at 2. If error, the date and "guilty by jury" reference are clerical mistakes, scrivener's errors that do not affect the substance of the court's order and may be corrected at any time. *State v. Davis*, 160 Wn. App. 471, 478, 248 P.3d 121 (2011). The footer at the bottom of White's judgment and sentence is immaterial; the caption and the interlineations on the form clearly show it is the judgment and sentence for Count IV. White's challenges fail.

4. Judgment and Sentence for Counts I, II, and III: White asserts that we should modify the judgment and sentence form for Counts I, II, and III as follows: (1) Strike the DNA (deoxyribonucleic acid) database fee of $100 because his DNA is already filed and recorded, and the Department of Corrections (DOC) did not collect the DNA sample as ordered; (2) strike the $1500 Department of Assigned Counsel (DAC) fee because his attorney worked pro bono and did

not work for DAC; (3) strike the legal financial obligations (LFOs) for the $500 victim penalty assessment because, White believes, he has to pay the fee twice, based on the trial court's oral and written orders instructing him to pay the victim penalty assessment at the sentencing hearing; and (4) strike the $2300 in total LFOs under former RCW 10.01.160(3) (2008) because White is indigent. These claims also fail.

The DNA database fee is mandatory for every sentence. Former RCW 43.43.7541 (2008). The record does not support White's contention that his attorney worked pro bono; on the contrary, the record shows that White's counsel was court-appointed. White mistakenly believes that the court assessed two $500 victim penalty assessments, when it imposed only one; the trial court merely informed White orally about inclusion of this condition on his judgment and sentence. Although the trial court found White indigent at the time of sentencing, it made no findings about his future ability to pay LFOs; and White did not object at sentencing to the imposition of costs.[17]

5. Community Custody: White asserts that the DOCs' "preapproved release address" community custody condition is very restrictive because his immigration status restricts his ability to obtain work; therefore, we should modify the restriction to be "less restrictive." SAG at 5. This claim also fails. The community custody portion of White's judgment and sentence requires White to receive prior living arrangement approval from the DOC. Under RCW 9.94A.703(2)(e), sentencing courts have discretion to waive DOC approval of a defendant's residence location and

[17] White's failure to object leaves him with only a constitutional challenge to the legal financial obligations, which will not be ripe for review until the State attempts to collect on his legal financial obligations. *State v. Phillips*, 65 Wn. App. 239, 244, 828 P.2d 42 (1992).

living arrangements as a community custody condition. Here, however, the trial court chose not to waive this condition; therefore, the condition was properly imposed under RCW 9.94A.703(2)(e). Moreover, White does not assert or show abuse of trial court discretion.

6, 7, 13, 14, 15. Evidence Sufficiency: White raises a variety of insufficient evidence claims, each of which lacks merit. Evidence is sufficient to support White's convictions if, when viewed in the light most favorable to the jury's verdicts, the evidence would permit any rational trier of fact to find the essential elements of the charged crime beyond a reasonable doubt. *State v. Kintz*, 169 Wn.2d 537, 551, 238 P.3d 470 (2010). An insufficiency claim admits the truth of the State's evidence and all reasonable inferences that can be drawn from the evidence. *Kintz*, 169 Wn.2d at 551. Finally, we defer to the trier of fact for all issues of conflicting testimony, witness credibility, and persuasiveness of evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). Accordingly, we defer to the jury's credibility determinations about the CI's and the various police officers' testimonies. A rational trier of fact could have found White guilty of each count and that counts I and II were committed within 1,000 feet of a school bus stop. *Kintz*, 169 Wn.2d at 551.

8. Identification Procedure: White contends that the identification procedure was improperly suggestive and, thus, violated his due process rights because the officers showed the CI a photograph of White and asked the CI if the person in the photograph was White. An out-of-court photographic identification violates due process when it is impermissibly suggestive to the point of giving rise to a substantial likelihood of irreparable misidentification. *State v. Vickers*, 148 Wn.2d 91, 118, 59 P.3d 58 (2002). The defendant bears the burden of showing that the

identification procedure was impermissibly suggestive; if so shown, we then consider whether the procedure created a substantial likelihood of irreparable misidentification based on the totality of the circumstances. *Vickers*, 148 Wn.2d at 118.

Even if the procedure here had been impermissibly suggestive,[18] White cannot satisfy his burden to show that it created a substantial likelihood of irreparable misidentification because he does not show how the photograph offset the following evidence: (1) the CI's opportunity to see White during the controlled January 19, 2010 buy; (2) the CI's attention to White while completing the controlled buy; (3) the accuracy of the CI's description of White, whose name was "Tony," as an Asian male in his 30s with a ponytail[19]; and (4) White's level of certainty in identifying White from the photograph. *See State v. Courtney*, 137 Wn. App. 376, 385-86, 153 P.3d 238 (2007). Thus, White's challenge to the photograph identification fails.

9. Hearsay: Citing the VRP at pages 215, 230, 242, and 243, White asserts that the trial court improperly allowed inadmissible hearsay evidence at trial. Except for page 242 of the VRP, White is mistaken: No out-of-court statements offered to prove the truth of the matter asserted appear on those pages. *See* ER 801(c). The out-of-court statements on page 242 of the VRP are statements of identification, which are exempt from the hearsay rule under ER 801(d)(1)(iii). Thus, White's cited pages of the VRP contain no inadmissible hearsay that the trial court should have suppressed or excluded.

10, 12, 18, 21[20]. Matters outside Record: White raises multiple claims that would require

[18] To identify White, Shaffer showed the CI a single photograph of White after the controlled buy.

[19] *Compare* 3 VRP at 274 *with* 2 VRP at 215; CP at 100; 2 VRP at 242.

us to consider affidavits and other evidence outside the record below and on appeal. We cannot address such claims. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); RAP 9.2(b).[21]

11, 17, 19, 20. Meritless: These claims lack merit.

14. Jury Instructions: In addition to White's arguments that we should reverse his convictions for counts I and II based on insufficiency of the evidence, he also apparently challenges two jury instructions, to which he failed to object below. Neither instruction was erroneous. Instruction 5 correctly stated that the law does not distinguish circumstantial evidence from direct evidence. *Thomas*, 150 Wn.2d at 874. Instruction 19 provided the correct definition of "constructive possession," "dominion and control over [the] substance." CP at 73; *State v. Partin*, 88 Wn.2d 899, 905-06, 567 P.2d 1136 (1977) *overruled by State v. Lyons*, 174 Wn.2d 354, 275 P.3d 314 (2012).

16. Evidence Relevancy: White next asserts that the following irrelevant evidence should have been suppressed: (1) testimony from a forensic scientist that she did not find any fingerprints on the plastic baggies seized during the search of his apartment; and (2) the surveillance equipment installed throughout the house. We review for abuse of discretion a trial court's

[20] White argues that his counsel provided ineffective assistance, in part, based on his opening statement. But the court reporter did not transcribe opening statements, which, thus, are not part of the record before us on appeal. Consequently, we have no record to support this claim.

[21] If White wishes to raise issues of facts and evidence outside of the record below, he must raise them in a personal restraint petition. *McFarland*, 127 Wn.2d at 335. If White wishes to raise facts from the record below not designated for appeal, he must supplement the record in accordance with RAP 9.10.

decision to admit evidence. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). There was no such abuse here. First, the State called the forensic scientist to explain the absence of fingerprint evidence tying White to the plastic baggies; this evidence was relevant because it made the existence of a consequential fact, namely whether the baggies belonged to White, more probable than without this evidence in that the testimony explained why White's fingerprints might not have been on baggies in his possession. ER 401. Second, the surveillance equipment evidence was also relevant because it also made the existence of a consequential fact, whether White had drugs at the apartment, more probable than without it in that the jury could infer that the equipment was used to monitor customers or police coming to the residence. ER 401.

18. Speedy Trial: White contends that his right to speedy trial was violated because (1) a hearing outside his presence, at which his first defense counsel withdrew, violated the confrontation clause[22] and due process clause[23] of the United States Constitution; and (2) the two continuances violated his right to a speedy trial. The record before us on appeal does not include a transcript of the hearing at which White's counsel withdrew. Accordingly, we do not have a sufficient record to review this first claim.

As to his second claim, the record we do have before us shows that White and his counsel both agreed to and signed both defense motions for continuance under CrR 3.3(f)(1). This explicit waiver on the record constituted a valid waiver of White's "speedy trial" rights

[22] U.S. Const. amend. VI.

[23] U.S. Const. amend. VI, XIV.

under CrR 3.3(c)(2)(i). *See also State v. Pomeroy*, 18 Wn. App. 837, 840-41, 573 P.2d 805 (1977).

We affirm White's convictions and the special sentencing enhancement on Count I. We reverse the school bus stop sentencing enhancement on Count II and 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 in accordance with RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Armstrong, P.J.

Penoyar, J.