IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. J D KIENITZ Appellant.	No. 41783-9-II UNPUBLISHED OPINION

Penoyar, C.J. — J D Kienitz appeals his convictions for three counts of unlawful delivery of a controlled substance (marijuana). He argues that the conditional terms of the State's plea offer deprived him of his constitutional right to assistance of counsel. He also asserts that the trial court issued an erroneous special verdict instruction. In the alternative, he contends that he received ineffective assistance of counsel when his defense counsel failed to object to the special verdict jury instruction. He raises further arguments in his statement of additional grounds (SAG).[1] We affirm.

FACTS

On February 17, 2009, the State charged Kienitz with three counts of unlawful delivery of a controlled substance (marijuana) with school bus route stop enhancements.[2] The State presented a plea offer but conditioned its offer on the nondisclosure of the identities of the

[1] RAP 10.10.

[2] In violation of RCW 69.50.401(1), (2)(c); RCW 69.50.435(1)(c); and former RCW 9.94A.533(6) (2008). The State also charged Kienitz with two counts of witness tampering and one count of intimidating a witness. The jury found Kienitz not guilty of one count of witness tampering and not guilty of intimidating a witness. The jury found Kienitz guilty of one count of witness tampering, but he does not challenge this conviction on appeal.

confidential informants.[3, 4]

Defense counsel requested the two confidential informants' identities. The State disclosed the identities, and defense counsel interviewed the two confidential informants. The State then withdrew its plea offer.

On July 30, Kienitz moved to dismiss the charges against him, arguing that the prosecutor committed prosecutorial misconduct by making a plea offer conditioned on the nondisclosure of the confidential informants' identities. The trial court denied the motion. At trial, the State called the confidential informants as witnesses and Kienitz cross-examined them.

Defense counsel proposed a jury instruction, which stated, in part:

> If you find the defendant guilty of these crimes, you will then use the special verdict form and fill in the blanks with the answer "yes" or "no" according to the decision you reach.

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[3] In an email to defense counsel, the prosecutor wrote, "Re: the [confidential informants], if we have to disclose them then the offer dated 2/18/09 is off the table and no further offers will be made to your client." Clerk's Papers (CP) at 43.

[4] We note that the information and amended informations cite RCW 69.50.435(1)(b), which establishes a sentencing enhancement for delivery of a controlled substance on a school bus. It appears, however, that the correct statute is RCW 69.50.435(1)(c), which establishes a sentencing enhancement for delivery of a controlled substance within 1,000 feet of a designated school bus route stop. Under CrR 2.1(a)(1), "Error in the citation or its omission [on the information] shall not be ground for dismissal of the . . . information or for reversal of a conviction if the error or omission did not mislead the defendant to the defendant's prejudice." Here, there is no prejudice because the information charges Kienitz with committing the offenses "within 1,000 feet of a school bus route stop." CP at 58.

> The special verdict form for these offenses has two questions.[5] Because this is a criminal question, all twelve of you must agree to answer each question.

Clerk's Papers (CP) at 68.

Ultimately, the trial court issued jury instruction number 24, which reads, in part:

> If you find the defendant guilty of the crime of Delivery of a Controlled Substance – Marijuana in Count 1, 2 or 3, you will then use the Special Verdict Form A for that Count and fill in the blank with the answer "yes" or "no" according to the decision you reach as to that Count. Because this is a criminal case, all twelve of you must agree in order to answer the special verdict forms, Special Verdict Form A. In order to answer the special verdict forms "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer as to each count. If you unanimously have a reasonable doubt as to this question, you must answer "no."

CP at 107. At trial, Kienitz objected to this instruction, arguing that the trial court should issue his proposed instruction, but he did not object to the unanimity language in the trial court's instruction.

The jury found Kienitz guilty of three counts of unlawful delivery of a controlled substance (marijuana) and answered "yes" to the three corresponding special verdict forms. The trial court imposed concurrent[6] sentences for each offense, as well as three consecutive[7] school

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[5] Defense counsel's proposed special verdict form asked the jurors two questions: (1) "Has the State proved beyond a reasonable doubt that the defendant delivered a controlled substance to a person" and (2) "[h]as the defendant proved by a preponderance of the evidence that (a) the defendant's conduct took place entirely within a private residence; and (b) no person under eighteen years of age was present in the private residence at any time during the commission of the offense; and (c) the defendant's conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance for profit?" CP at 74-75.

[6] The trial court sentenced Kienitz to 12 months' confinement on each count.

[7] The trial court sentenced Kienitz to 24 months for each school bus route stop enhancement, resulting in a total of 72 months' confinement for the school zone enhancements.

zone enhancements, resulting in a total of 84 months' confinement. Kienitz petitioned the Supreme Court for review. The Supreme Court transferred the case to this court.

ANALYSIS

I. Plea Offer

A. Right to Counsel

First, Kienitz argues that he was denied his right to counsel under the Washington and United States Constitutions. Specifically, he asserts that the State's plea offer denied him his constitutional right to assistance of counsel. Kienitz asserts that "[i]t is difficult to imagine how a defendant and his counsel can adequately evaluate the strength of the State's evidence and the chances of prevailing at trial without knowing the identities of the witnesses who participated in the crime and provided the source and basis for the State's evidence of guilt." Appellant's Reply Br. at 6. We find no constitutional violation here.

A criminal defendant has a right to the assistance of counsel at every critical stage of a criminal proceeding. U.S. Const. amend. VI; Wash. Const. art. I, § 22; *State v. Robinson*, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). "[T]he right to counsel is the right to the effective assistance of counsel." *United States v. Cronic*, 466 U.S. 648, 654, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct 1441, 25 L. Ed. 2d 763 (1970)). "If no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated." *Cronic*, 466 U.S. at 654.

The right to counsel requires that the defense be permitted to participate fully and fairly in the adversary factfinding process. *Herring v. New York*, 422 U.S. 853, 858, 95 S. Ct. 2550, 45 L. Ed. 2d 593 (1975). "[I]f counsel entirely fails to subject the prosecution's case to meaningful

adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable." *Cronic*, 466 U.S. at 659.

"A defendant does not have a constitutional right to plea bargain." *State v. Wheeler*, 95 Wn.2d 799, 804, 631 P.2d 376 (1981) (citing *Weatherford v. Bursey*, 429 U.S. 545, 97 S. Ct. 837, 51 L. Ed. 2d 30 (1977)). But "[t]he presence of counsel during all stages of plea bargaining is mandated by the courts." *State v. Swindell*, 93 Wn.2d 192, 198, 607 P.2d 852 (1980).

To support its contention that Kienitz's argument should fail, the State relies on *State v. Moen*, 150 Wn.2d 221, 76 P.3d 721 (2003). In *Moen*, the defendant argued that "the State's policy of refusing to plea bargain with a criminal defendant who successfully compels disclosure of the State's confidential informant in a civil forfeiture action chills his right to obtain discovery in the civil case and thus violates due process." 150 Wn.2d at 225. Our Supreme Court held that the policy did not violate the defendant's due process rights.

In reaching its conclusion, the court recognized the contractual nature of plea bargains, reasoning that "[a] plea bargain is a contract and both sides to the agreement must perceive an advantage to entering the bargain." *Moen*, 150 Wn.2d at 230 (internal citation omitted). Further, the court noted the legitimate State interest in protecting the identity of confidential informants. *Moen*, 150 Wn.2d at 230 (citing *State v. Casal*, 103 Wn.2d 812, 815, 699 P.2d 1234 (1985)). "When the State is compelled to disclose an informant's identity, it loses a valuable asset or tool of law enforcement. Under the policy, the State gains protection of its informants and, in exchange, the defendant receives the opportunity to bargain for a reduction or dismissal of charges." *Moen*, 150 Wn.2d at 230.

> We recognize that the prosecutor's policy requires the defendant to forgo his right to request disclosure of an informant's identity. However, a condition

> insisted on by the State that requires a defendant to give up a constitutional right does not, by itself, violate due process. "Agreements to forgo seeking an exceptional sentence, to decline prosecuting all offenses, to pay restitution on uncharged crimes, and to waive the right to appeal are all permissible components of valid plea agreements." *State v. Lee*, 132 Wn.2d 498, 506, 939 P.2d 1223 (1997); *see State v. Perkins*, 108 Wn.2d 212, 737 P.2d 250 (1987). The theoretical basis for all plea bargaining is that defendants will agree to waive their constitutional rights. *Perkins*, 108 Wn.2d at 217.

Moen, 150 Wn.2d at 230-31.

Moen supports the conclusion that the State's plea offer was proper. First, a plea bargain is a contract and here the State's offer was motivated by its legitimate interest in protecting the identities of its informants. Further, while the offer required Kienitz to waive his right to request disclosure of the informants' identities, waivers are necessary components of plea agreements. *See Moen*, 150 Wn.2d at 230-31.

Kienitz fails to show that defense counsel "failed to function in any meaningful sense as the Government's adversary," ultimately depriving him of his right to assistance of counsel. *Cronic*, 466 U.S. at 666. Kienitz does not have a constitutional right to plea bargain and he participated fully in the adversarial process. After Kienitz requested the confidential informants' identities, the State provided defense counsel with their identities and defense counsel interviewed the two individuals. The confidential informants testified at trial and Kienitz had the opportunity to cross-examine them. Kienitz had a true adversarial criminal trial in which he was represented by counsel. The State's conduct did not deprive Kienitz of his right to assistance of counsel.

B. Ineffective Assistance of Counsel

To the extent Kienitz is arguing that specific errors made by defense counsel deprived him of his right to effective assistance of counsel, we reject his argument.[8] In order to prove ineffective assistance of counsel, Kienitz has the burden of showing that (1) his counsel's performance fell below an objective standard of reasonableness and (2) his counsel's performance prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686. "Effective assistance of counsel includes assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial." *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010) (citing *State v. S.M.*, 100 Wn. App. 401, 413, 996 P.2d 1111 (2000)). "[A] defendant's counsel cannot properly evaluate the merits of a plea offer without evaluating the State's evidence." *A.N.J.*, 168 Wn.2d at 109.

As support for his argument, Kienitz cites *A.N.J.*, 168 Wn.2d 91. In *A.N.J.*, the State offered the defendant a plea deal: if the defendant would plead guilty to one count of first degree child molestation, the State would recommend a special sex offender disposition alternative; and, if the defendant finished treatment, the charge would be reduced to second degree child molestation. 168 Wn.2d at 101. Defense counsel spent less than an hour with the defendant

[8] Because Kienitz has not established that defense counsel's performance was deficient, we need not reach the prejudice prong of the ineffective assistance of counsel test. The recent United States Supreme Court cases, *Lafler v. Cooper*, 2012 WL 932019, and *Missouri v. Frye*, 2012 WL 932020, do not affect our determination that counsel did not act deficiently in evaluating Kienitz's case.

before the plea hearing, did no independent investigation, did not review the plea agreement carefully, and did not consult with experts. *A.N.J.*, 168 Wn.2d at 102. The defendant pleaded guilty but, after hiring a new attorney, moved to withdraw his guilty plea. *A.N.J.*, 168 Wn.2d at 102. The trial court denied his motion. *A.N.J.*, 168 Wn.2d at 105. Our Supreme Court concluded that the defendant received ineffective assistance of counsel and held that "at the very least, counsel must reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *A.N.J.*, 168 Wn.2d at 111-12.

This case is quite unlike *A.N.J.* Kienitz's counsel did not act deficiently in evaluating the case, as he considered the State's evidence that was available and ultimately decided that it was critical to obtain the confidential informants' identities and interview them. The prosecutor's conduct did not cause Kienitz to receive ineffective assistance of counsel.

II. Jury Instruction

Next, Kienitz asserts that the trial court erred by instructing the jury that it must be unanimous in order to answer "no" on the special verdict forms. The State contends that Kienitz waived the right to raise this issue for the first time on appeal. We do not consider Kienitz's argument for the first time on appeal because the alleged error is not a manifest constitutional error.

A. *Bashaw* Overview

In *State v. Bashaw*, 169 Wn.2d 133, 146, 234 P.3d 195 (2010), our Supreme Court held that "a unanimous jury decision is not required to find that the State has failed to prove the presence of a special finding increasing the defendant's maximum allowable sentence. A

nonunanimous jury decision is a final determination that the State has not proved the special finding beyond a reasonable doubt." Thus, the *Bashaw* court concluded that a jury instruction stating that all 12 jurors must agree on an answer to the special verdict was erroneous. 169 Wn.2d at 147. The court reasoned, "Though unanimity is required to find the *presence* of a special finding increasing the maximum penalty . . . it is not required to find the *absence* of such a special finding. The jury instruction here stated that unanimity was required for either determination. That was error." *Bashaw*, 169 Wn.2d at 147.

Following *Bashaw*, Division One of this court held that the following jury instruction on special verdicts was also improper: "In order to answer the special verdict forms 'yes,' you must unanimously be satisfied beyond a reasonable doubt that 'yes' is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer 'no.'" *State v. Ryan,* 160 Wn. App. 944, 947, 252 P.3d 895, *review granted*, 172 Wn.2d 1004 (2011); *see also State v. Guzman Nunez,* 160 Wn. App. 150, 163, 248 P.3d 103, *review granted*, 172 Wn.2d 1004 (2011) (containing the same jury instruction language rejected in both *Bashaw* and *Ryan* but declining to review the claimed error for the first time on appeal because it was not manifest constitutional error). At Kienitz's trial, the trial court issued the same jury instruction as the one at issue in *Ryan* and *Nunez.*

B. Manifest Constitutional Error

The State asserts that we should not consider the claimed error for the first time on appeal under RAP 2.5(a) because it "is not of constitutional dimension." Resp't's Br. at 21. We agree.

An error cannot be raised for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); *State v. O'Hara*, 167 Wn.2d 91, 98, 217 P.2d 756 (2009).

For the RAP 2.5(a)(3) exception to apply, the appellant must demonstrate that (1) the error is truly of constitutional magnitude and (2) the error is manifest. *O'Hara*, 167 Wn.2d at 98. For an error to be "manifest," the defendant must show that the asserted error had practical and identifiable consequences at trial. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011).

The State asserts that "the claimed error is not of constitutional dimension." Resp't's Br. at 21. We recently held, in *State v. Grimes*, that "instructional error requiring jury unanimity to answer 'no' on the special sentence enhancement verdict form . . . is not constitutional in nature." 165 Wn. App. 172, 189, 267 P.3d 454 (2011). We follow *Grimes* and hold that the alleged error does not affect a constitutional right.

Furthermore, Kienitz's claim fails because the alleged error does not meet the RAP 2.5(a)(3) requirement that it be a "manifest" error. As Kienitz did not challenge or present conflicting evidence on the school bus route stop issue, our independent review of the record does not reveal any practical and identifiable consequences at his trial. Furthermore, the trial court could not have been informed by *Bashaw* at the time of Kienitz's trial. *See O'Hara*, 167 Wn.2d at 100 ("[T]o determine whether an error is practical and identifiable, the appellate court must place itself in the shoes of the trial court to ascertain whether, given what the trial court knew at that time, the court could have corrected the error."). Kienitz's trial took place in January of 2010 and *Bashaw* was filed on July 1, 2010. Accordingly, because the alleged error was neither constitutional nor manifest, we decline to review Kienitz's claim.[9]

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[9] Further, any error was harmless beyond a reasonable doubt in the context of Kienitz's trial as it did not affect his rights at trial or the jury's verdict. At trial, Kienitz did not challenge or present conflicting evidence on this issue.

III. Ineffective Assistance of Counsel

Kienitz asserts that "to the extent the error in the jury instructions was invited by defense counsel, Mr. Kienitz received ineffective assistance of counsel." Appellant's Br. at 28. Again, we disagree.

We do not address whether defense counsel's performance was deficient because Kienitz's argument fails for lack of prejudice. At trial, the State presented testimony on several school bus route stops located within 1,000 feet of Kienitz's home. Kienitz did not challenge or present conflicting evidence on this issue.[10] Further, Kienitz's proposed special verdict jury instructions asked the jury whether Kienitz had proven an affirmative defense to the school bus route stop enhancements:

> Has the defendant proved by a preponderance of the evidence that (a) the defendant's conduct took place entirely within a private residence; and
>
> (b) no person under eighteen years of age was present in the private residence at any time during the commission of the offense; and
>
> (c) the defendant's conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance for profit?

CP at 74-75. Defense counsel did not address the school bus route stop enhancements in closing argument. Thus, the jury had unchallenged evidence and no argument against the school bus route stop enhancements. Under these facts, we conclude that Kienitz was not prejudiced because there is no reasonable probability that the outcome would have differed if the jury had been properly instructed.

[10] Defense counsel cross-examined the State's two witnesses, but he did not elicit contradictory testimony.

IV. Statement of Additional Grounds

A. Sentence

In his SAG, Kienitz argues that the trial court erred when it sentenced him to 84 months' confinement. Specifically, he argues that the statutory maximum for delivery of a controlled substance (marijuana) is 60 months. Kienitz's argument is misguided because the statutory maximum applies to each conviction, not to the total sentence. The jury convicted Kienitz of three counts of delivery of a controlled substance (marijuana). With regard to Kienitz's three unlawful delivery of a controlled substance (marijuana) convictions, the trial court sentenced Kienitz to 12 months' confinement with an additional 24 months' confinement for the school bus route stop sentencing enhancement. Thus, for each delivery of a controlled substance (marijuana) conviction, the trial court sentenced Kienitz to only 36 months' confinement. Even though the trial court sentenced Kienitz to over 60 months' total confinement, this was the total sentence for four convictions.[11]

B. Affirmative Defense

Kienitz also argues that he was entitled to an affirmative defense under RCW 69.50.435(4) because "the crime was [i]nside [his] [p]rivate [r]esidence" and "the crime was not for [p]rofit." SAG at 5. RCW 69.50.435(4) reads:

> It is an affirmative defense to the prosecution for a violation of this section that the prohibited conduct took place entirely within a private residence, that no person under eighteen years of age or younger was present in such private residence at any time during the commission of the offense, and that the prohibited conduct did not involve delivering, manufacturing, selling, or possessing with the intent to manufacture, sell, or deliver any controlled substance in RCW 69.50.401 for profit. The affirmative defense established in this section shall be proved by the defendant

[11] The fourth conviction is a witness tampering conviction that Kienitz does not challenge on appeal.

by a preponderance of the evidence.

To support his argument that he did not sell the marijuana for profit, Kienitz cites to a portion of the record in which his defense counsel stated, "[Kienitz] made a total of $160.00 profit every month from selling drugs. So, he used $160.00 to help pay for food and rent and to live." RP at 491. Further, witnesses at trial testified that they paid Kienitz for marijuana during the three controlled buys. The record simply does not support Kienitz's claim.

C. Enhancement Statute

Finally, Kienitz challenges the application of sentencing enhancements under RCW 69.50.435[12] to his convictions[13] and asks us to "[o]verrule/[m]odify the *Pierce*[14] [d]ecision to reflect the [legislative intent of the] [l]aws that [were] passed." SAG at 8. In *State v. Pierce*, we considered whether RCW 69.50.435 applied to the manufacture of marijuana. 78 Wn. App. 1, 3, 895 P.2d 25 (1995). We held that "[u]pon reading RCW 69.50.401, .410, and .435 together, it is clear that the Legislature did not intend to exclude marihuana offenses that violated RCW 69.50.401 from the enhancement provisions of RCW 69.50.435(a)." *Pierce*, 78 Wn. App. at 4.

[12] RCW 69.50.435(1)(c) reads, in pertinent part:

> 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 69.50.410 by 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 . . . [w]ithin one thousand feet of a school bus route stop designated by the school district . . . may be punished by . . . imprisonment of up to twice the imprisonment otherwise authorized by this chapter.

[13] Kienitz was found guilty of three counts of violating RCW 69.50.401.

[14] *State v. Pierce*, 78 Wn. App. 1, 895 P.2d 25 (1995).

Here, the jury found Kienitz guilty of violating RCW 69.50.401. We follow *Pierce* and conclude that the sentencing enhancements were properly applied to Kienitz's marijuana offenses.

Affirmed.

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.

Penoyar, C.J.

We concur:

Van Deren, J.

Worswick, J.