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Washington State
Court of Appeals
Division Two

July 11, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. MICHAEL E. REA, Appellant.	No. 48329-7-II UNPUBLISHED OPINION

BJORGEN, C.J. — A jury returned verdicts finding Michael Rea guilty of involving a minor in a controlled substance (marijuana) transaction and unlawful delivery of a controlled substance (marijuana). Rea appeals from his convictions and resulting sentence, asserting: (1) the trial court abused its discretion by permitting the State to reopen its case after it had rested its case in chief; (2) the trial court erred by denying defense counsel's motion to dismiss for insufficient evidence; (3) his defense counsel was ineffective for failing to request certain jury instructions; (4) his defense counsel was ineffective at the sentencing hearing for failing to argue that his two convictions constituted the same criminal conduct; and (5) the trial court erred by imposing a community custody condition prohibiting him from frequenting places that sell

liquor. In his statement of additional grounds for review (SAG), Rea raises issues that would require consideration of matters outside the record on appeal and, thus, we do not address them.

We accept the State's concession that the trial court erred by imposing the community custody condition that Rea not frequent places that primarily sell liquor and, thus, remand for a correction of his sentence to strike the improper condition. In all other respects, we affirm.

FACTS

On October 7, 2014, Shelton Police Sergeant Harry Heldreth received reports that Rea was selling drugs to minors. Heldreth saw Rea standing in front of the Shelton civic center and contacted him. Heldreth asked Rea if he had any drugs on him. Rea responded affirmatively and opened his fanny pack, revealing 20 to 21 bindles of marijuana and 5 small containers of a substance that Rea described as hash oil. Rea told Heldreth that he had paid $240 for the marijuana and $100 for the hash oil. Rea also told Heldreth that he would be by the civic center all day "to point out pedophiles to the kids to keep them safe." Report of Proceedings (RP) at 100. Heldreth asked Rea how many bindles of marijuana he would have on him later in the afternoon, and Rea responded that he would be "down a few because I'm going to go off into the woods and medicate myself and smoke some of it." RP at 100. When Heldreth contacted Rea later that afternoon, Rea had 15 bindles of marijuana remaining in his fanny pack. Heldreth told Rea that he suspected Rea was selling marijuana to people.

The following afternoon, Heldreth again saw Rea outside of the civic center. Heldreth covertly observed Rea through binoculars from about 60 feet away. Heldreth saw 17-year-old KLC[1] talk to Rea for a few seconds before KLC walked away. Heldreth then observed KLC

[1] This opinion uses the juvenile's initials to protect his interest in privacy.

make a hand-to-hand transaction with another person, in which it appeared KLC exchanged marijuana for cash. Heldreth saw KLC return to Rea and hand Rea money before again walking away. Heldreth then saw KLC make another hand-to-hand transaction with another person before again returning and handing money to Rea.

Heldreth contacted both Rea and KLC. Heldreth asked Rea and KLC whether they had any drugs on them, and KLC showed Heldreth a compact disc (CD) case containing 11 bindles of marijuana and 4 containers of hash oil. Rea admitted to Heldreth that the marijuana in KLC's possession belonged to him but denied giving the marijuana to KLC, stating that he had "no clue how [KLC] came into possession of it." RP at 120. Rea also told Heldreth that the $40 KLC had handed him was payment toward a previous loan he made to KLC.

On November 4, 2015, the State charged Rea by second amended information with one count of involving a minor in a controlled substance transaction and one count of unlawful delivery of a controlled substance. The matter proceeded to a jury trial.

At trial, Heldreth testified consistently with the facts above. KLC testified that Rea had given him the suspected marijuana to sell in exchange for some marijuana and a few dollars. KLC further testified that he had owed Rea money, but he could not recall whether it had been a loan to purchase a phone card or whether he owed Rea money for a previous marijuana debt. KLC stated that he conducted two transactions with Rea's marijuana on October 8 and that he gave the proceeds to Rea.

Catherine Dunn, a forensic scientist for the Washington State Patrol Forensic Laboratory Services, Crime Lab Division, testified that the substance in the bindles found in KLC's possession was marijuana. Dunn did not initially testify as to the percentage of Tetrahydrocannabinol (THC) concentration contained in the suspected marijuana samples. After the State told the trial court outside the presence of the jury that it was resting its case in chief, defense counsel moved to dismiss Rea's charges for insufficient evidence. Defense counsel argued that, because the statutory definition of marijuana required a showing that the substance had a THC concentration greater than 0.3 percent on a dry weight basis, the State had failed to present evidence sufficient to meet its burden of proof. The State argued that it had presented sufficient evidence for the jury to find the suspected substances were marijuana and, alternatively, moved to reopen its case to recall Dunn as a witness. After hearing additional argument from counsel, the trial court granted the State's motion to reopen its case and reserved ruling on the defense's motion to dismiss. The State then recalled Dunn, who testified that all the samples she had tested "contained marijuana because they contained greater than 0.3 [percent] total THC." RP at 235. Following Dunn's testimony on recall, the State rested its case in chief.

Rea testified in his defense. During his testimony, Rea admitted that the CD case and marijuana found in KLC's possession belonged to him. Rea stated that he did not know how KLC came into possession of his marijuana, and he denied that KLC was selling marijuana for him. Following Rea's testimony, the trial court denied Rea's motion to dismiss based upon the additional evidence provided by the State.

The jury returned verdicts finding Rea guilty of both charges. As part of his sentence, the trial court imposed a community custody condition prohibiting Rea from going "into bars, taverns, lounges, or other places whose primary business is the sale of liquor." Clerk's Papers (CP) at 38. Rea appeals.

ANALYSIS

I. MOTION TO REOPEN

Rea first contends that the trial court erred by granting the State's motion to reopen its case after his defense counsel had moved to dismiss his charges for insufficient evidence. We disagree.

"'A motion to reopen a proceeding for the purpose of introducing additional evidence is addressed to the sound discretion of the trial court.'" *State v. Luvene*, 127 Wn.2d 690, 711, 903 P.2d 960 (1995) (quoting *State v. Sanchez*, 60 Wn. App. 687, 696, 806 P.2d 782 (1991)). A trial court abuses its discretion if its decision is based on untenable grounds or untenable reasons. *Sanchez*, 60 Wn. App. at 696. To demonstrate reversible error based on a trial court's ruling on a motion to reopen, the appealing party must show *both* a manifest abuse of discretion *and* resulting prejudice. *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992).

In *Brinkley*, we discussed this requisite showing of prejudice in some detail. We first acknowledged that "Washington courts have upheld trial court decisions allowing the prosecution to reopen to present further evidence after the defense has moved for dismissal on the basis of insufficiency of the evidence." 66 Wn. App. at 848 (citing *In re Estes v.*

Hopp, 73 Wn.2d 263, 264-65, 438 P.2d 205 (1968); *State v. Vickers*, 18 Wn. App. 111, 113, 567 P.2d 675 (1977); *City of Seattle v. Heath*, 10 Wn. App. 949, 953, 520 P.2d 1392 (1974)). Therefore, we recognized that a trial court does not per se abuse its discretion by allowing the prosecution "to present additional evidence to resolve deficiencies in its case pointed out by the defendant." *Brinkley*, 66 Wn. App. at 848. We concluded that the "determination of whether the trial court's decision to allow the State to reopen constitutes an abuse of discretion depends to some extent on the potential for unfairness to the complaining party," apart from any unfairness inherent in permitting the State to present additional evidence. *Brinkley*, 66 Wn. App. at 850. In applying this standard, we held that the trial court did not abuse its discretion by granting the State's motion to reopen, stating:

> There is no indication that the State took the action it did to put [the defendant] at a disadvantage. Nor is there any indication that it engaged in trickery or made a calculated decision to hold evidence back. In short, [the defendant] was faced with evidence which could have been presented during the State's case in chief and there is no suggestion that the impact of this additional evidence was intensified due to the timing of its presentation.

Brinkley, 66 Wn. App. at 851.

Although Rea acknowledges that he must show prejudice resulting from the trial court's ruling granting the State's motion to reopen its case, he fails to identify any such prejudice in his appellate brief.[2] Instead, Rea attempts to distinguish Washington cases upholding a trial court's

[2] Similarly at trial, defense counsel did not argue Rea would be unfairly prejudiced by allowing the State to reopen its case in chief, instead agreeing with the State that Rea could not meet the prejudicial standard articulated in *Brinkley* and that the trial court would not abuse its discretion if it granted the State's motion.

decision to allow the State to reopen its case after a defense motion to dismiss on the basis that, here, the State believed that it was not required to present any additional evidence to prove Rea was guilty of the charges.

This is a distinction without a difference, because the State's belief as to its burden of proof bears no relation to whether Rea was unfairly disadvantaged by the trial court's ruling allowing the State to reopen its case to present additional evidence. In short, here, as in *Brinkley*, there is no indication that the State took its action to place Rea at a disadvantage, engaged in trickery, or made any calculated decision to hold evidence back. 66 Wn. App. at 851. Also similar to *Brinkley*, the State presented evidence after reopening its case that was available to it during its case in chief, and there is nothing indicating that the State's evidence was intensified by the timing of its presentation. 66 Wn. App. at 851. Because Rea has failed to demonstrate any prejudice, we affirm the trial court's ruling granting the State's motion to reopen its case in chief.

II. MOTION TO DISMISS

Next, Rea contends that the trial court erred by denying his motion to dismiss for insufficient evidence because, in denying the motion to dismiss, the trial court relied on the additional evidence presented by the State following what Rea contends was an erroneous grant of the State's motion to reopen its case. Because Rea's argument on this issue relies on his contention that the trial court erroneously granted the State's motion to reopen, which contention we have rejected above, we need not further address it.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Next, Rea raises several ineffective assistance of counsel claims, which we address in turn. We review claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on his ineffective assistance of counsel claims, Rea must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced him. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). Representation is deficient "if it falls 'below an objective standard of reasonableness.'" *Grier*, 171 Wn.2d at 33 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Prejudice ensues if there is a reasonable probability that absent counsel's deficient performance, the result of the proceeding would have differed. *Grier*, 171 Wn.2d at 34. If Rea fails to establish either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

We strongly presume that counsel's representation was effective. *Grier*, 171 Wn.2d at 33. To overcome this presumption, Rea must show the absence of any legitimate strategic or tactical reason explaining defense counsel's challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012).

A. Failure to Request a Cautionary Accomplice Jury Instruction

Rea first asserts that his defense counsel was ineffective for failing to request the following standard cautionary jury instruction regarding the testimony of an alleged accomplice:

> Testimony of an accomplice, given on behalf of the [State], should be subjected to careful examination in the light of other evidence in the case, and should be acted

> upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

See 11 *Washington Practice: Washington Pattern Jury Instructions: Criminal* 6.05, at 197 (4th ed. 2016) (WPIC). We disagree.

WPIC 6.05 is mandatory only when the State's case rests solely upon uncorroborated accomplice testimony. WPIC 6.05, cmt. at 197 (citing *State v. Willoughby*, 29 Wn. App. 828, 630 P.2d 1387 (1981)). "[F]ailure to give this instruction is always reversible error when the prosecution relies *solely* on accomplice testimony." *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984), *overruled on other grounds by State v. McKinsey*, 116 Wn.2d 911, 914, 810 P.2d 907 (1991). "[W]hether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration." *Harris*, 102 Wn.2d at 155.

Here, KLC's[3] testimony that Rea gave him marijuana to sell and that he engaged in two marijuana transactions from which he paid Rea the proceeds was substantially corroborated by other evidence in the case and, thus, Rea cannot show that the trial court would have exercised its discretion to give the cautionary accomplice jury instruction had defense counsel requested it. Although Rea denied giving KLC marijuana to sell, he admitted in his own testimony that the marijuana found in KLC's possession belonged to him and that KLC had handed him cash on the date of the incident forming the basis for his charges. Heldreth testified that he had twice

[3] We assume for purposes of argument that KLC was an accomplice.

observed KLC approach Rea before walking away and engaging in hand-to-hand transactions with another person in which it appeared KLC was exchanging marijuana for cash. Heldreth further observed KLC hand Rea cash following each transaction. Because this evidence substantially corroborates KLC's testimony, Rea fails to show that the trial court would probably have given a cautionary accomplice jury instruction had defense counsel requested it. Accordingly, Rea cannot show that his counsel's failure to request the instruction prejudiced him and, thus, he cannot demonstrate ineffective assistance on this ground.

B. Failure to Request Lesser Included Jury Instruction

Next, Rea asserts that his defense counsel was ineffective for failing to request a jury instruction on the lesser-included misdemeanor offense of possession of less than 40 grams of marijuana. This assertion fails because there was no evidence presented at trial that Rea had possessed more than one ounce (28.3 grams) of marijuana but less than 40 grams of marijuana on the date of the incident, and possession of less than an ounce of usable marijuana by a person 21 years of age or older was not a crime in Washington on the date of Rea's charged crimes. *See* former RCW 69.50.4013(3) (2013); former RCW 69.50.4014 (2003). Here, the evidence, when viewed in a light most favorable to the giving of the lesser-included misdemeanor possession instruction, showed that Rea was over 21 years of age at the time of the incident forming the bases for his charges. The evidence further showed that Rea had five and one half grams of usable marijuana and one gram of hash oil on his person when arrested, less than the threshold amount required to constitute a crime. Former RCW 69.50.4013(3); former RCW 69.50.360(3) (2014). Because the evidence at trial was insufficient for a jury to find Rea guilty of

misdemeanor possession of marijuana, his defense counsel was not ineffective for failing to request the lesser-included jury instruction.

C. Failure to Raise a Same Criminal Conduct Argument

Next, Rea asserts that his defense counsel was ineffective at sentencing by failing to argue that his convictions constituted the same criminal conduct. We disagree.

To prevail on a claim that Rea's crimes constituted the same criminal conduct, his defense counsel would have had to show that Rea's crimes required the same criminal intent, were committed at the same time and place, and involved the same victim. Former RCW 9.94A.589(1)(a) (2002). Defense counsel would have been unsuccessful in making this showing, because Rea's convictions did not involve the same victim. KLC was the victim of Rea's conviction of involving a minor in a controlled substance transaction, while the victim of his unlawful delivery conviction was the public at large. *State v. Hollis*, 93 Wn. App. 804, 818, 970 P.2d 813 (1999). Because Rea's crimes each involved a different victim, he cannot show that his counsel's failure to raise a same criminal conduct claim resulted in any prejudice. As such, he cannot demonstrate ineffective assistance on this ground.

IV. COMMUNITY CUSTODY CONDITION

Next, Rea contends that the trial court erred by imposing a community custody condition prohibiting him from entering "bars, taverns, lounges, or other places whose primary business is the sale of liquor." CP at 38. The State concedes that the trial court lacked statutory authority to impose this condition. We accept the State's concession and remand for a correction of Rea's sentence to strike this condition.

A court may only impose a sentence that is authorized by statute. *State v. Barnett*, 139 Wn.2d 462, 464, 987 P.2d 626 (1999). The community custody condition statute in effect when Rea committed his crimes, former RCW 9.94A.703(3) (2009), provided the sentencing court with discretion to impose certain enumerated conditions of community custody. Because the condition at issue here is not among those enumerated conditions, the trial court would be statutorily authorized to impose it only if it related to Rea's crimes of conviction. Former RCW 9.94A.703(3)(f). There is no evidence in the record that patronizing businesses that sell alcohol contributed to Rea's crimes and, thus, the trial court lacked statutory authority to impose the condition prohibiting his entry of such establishments. Accordingly, we remand for a correction of Rea's sentence to strike this condition.

V. SAG

Rea raises two issues in his SAG, both of which would require us to examine matters outside the direct appeal record. He first asserts that KLC's recorded statement with Heldreth would have assisted in his defense if it had been admitted as evidence and played for the jury. It is unclear under what legal theory Rea is asserting error based on the absence of this evidence at trial. Regardless of what legal theory Rea is pursuing, we cannot evaluate whether the recorded statement would have benefitted his defense because the statement is not in the appellate record. Accordingly, if Rea wishes to pursue this matter further, he must raise it in a personal restraint petition. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

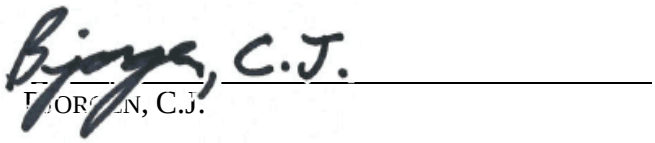
Next, Rea asserts that his defense counsel was ineffective for failing to call a certain

witness to testify on his behalf. On the record before us, however, we cannot discern whether this witness was willing and available to testify at trial, whether her testimony would have benefitted the defense, or whether defense counsel declined to call her as a witness as a matter of legitimate trial strategy. Because Rea's ineffective assistance of counsel claim cannot be evaluated on the record before us, we do not further address it.

Finally, Rea mentions improper coaching of the State's witnesses in his SAG. To the extent that he is claiming error based on improper witness coaching, there is no indication of such coaching in the direct appeal record. Accordingly, we do not address it.

We affirm Rea's convictions and remand for a correction of his sentence consistent with this opinion.

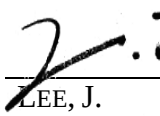
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



BJORGEN, C.J.

We concur:

WORSWICK, J.



LEE, J.