IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOANNE MARIE WHITE a/k/a JOANNA M. WHITE, Appellant.	No. 39399-9-II UNPUBLISHED OPINION

Alexander, J.P.T.[1] — Joanne Marie White appeals her conviction for possession of a controlled substance—methamphetamine with intent to deliver and its accompanying school bus route stop sentencing enhancement.[2] She contends that (1) the evidence was insufficient to prove the sentencing enhancement because the State's evidence did not show that the school bus route stops it established existed on the day of the offense, (2) her trial counsel rendered ineffective assistance of counsel when he failed to object to certain hearsay testimony, and (3) one of her community custody conditions is not crime related and is unconstitutionally vague. The State

[1] Justice Alexander is serving as judge pro tempore of the Court of Appeals, Division II, under CAR 21(c).

[2] RCW 69.50.435(1)(c).

concedes that the community custody provision is not sufficiently crime related. We reject White's ineffective assistance of counsel claim, but agree that the evidence was insufficient to prove the sentencing enhancement and accept the State's concession on the community custody provision issue. We affirm the conviction, vacate the sentencing enhancement, strike the community custody provision and remand for resentencing.

FACTS

I. Background

On June 11, 2008, officers from the Clark County Sheriff's Office and the Department of Corrections executed a search warrant for Zachary Douglas Davies at 6106 Northeast 14th Court, Unit B, in Vancouver, Washington. The residence was three stories with a basement/garage level, a main floor, and a top floor containing three bedrooms and a bathroom. When the officers entered, White was standing in the third floor hallway. Davies and his girlfriend, Kimberly Stalnaker, were also in the residence.

Inside the southeast bedroom, officers found a wooden box containing some small plastic bags and a glass pipe, several glass "meth pipes," a scale, numerous unused plastic baggies, and a baggie containing 2.555 grams of methamphetamine between some cushions. Report of Proceedings (RP) (June 1, 2009) at 53. They also found White's purse, which contained $386 in cash, White's bank card, and White's Clark College application. The State charged White in Clark County Superior Court with possession of a controlled substance—methamphetamine, with intent to deliver with a school bus route stop enhancement.[3]

[3] Officers also found methamphetamine on Davies when they searched him. The State charged Davies with possession of methamphetamine in a joint information. Davies was not, however,

II. Procedure

A. Trial

1. Possession Evidence

The case went to trial before a jury on June 1, 2009. Clark County Sheriff's Detective Gordon Conroy testified that when he was helping to execute the search warrant, he observed White standing in the third floor hallway. Conroy stated that during the search, White told him that she had lived in the residence for about one month and that the southeast bedroom on the third floor was her bedroom. When Conroy asked her if there were "narcotics" in the room, White responded that she did not know of any but that some of the things in the bedroom belonged to a former roommate. RP (June 1, 2009) at 35. White was, however, "unable to provide" Conroy with the former roommate's name. RP (June 1, 2009) at 36. Conroy also testified that White had admitted the purse and its contents were hers. Conroy did not, however, recall seeing a bed in the southeast bedroom nor did he recall see anything in the room other than White's purse that suggested she had been using the bedroom.

White testified that she had first moved into the residence in April 2008, but that she had only stayed a week; she returned at the end of May. She stated that in April, another couple, "Janet and Hank," were using the southeast bedroom. RP (June 2, 2009) at 112.

White denied having told Conroy that the southeast bedroom was hers and asserted that she had told him only that she had been napping in the room. She testified that she was renting the basement/garage area of the residence;[4] that she kept her bedding and other belongings in the

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tried with White.

[4] White's boyfriend's sister and White's daughter also testified that White had been living in the

basement, the laundry room, or her car; that Davies and Stalnaker occupied the entire third floor; and that the southeast bedroom was Stalnaker's computer room. But White also admitted that since moving back into the residence at the end of May, she had been sleeping on a blow-up mattress in the living room or in the southeast bedroom because Davies was in the process of moving his computer equipment out of the basement. She also admitted that she sometimes kept her purse and some belongings locked in a "tall jewelry box armoire thing," in the southeast bedroom because there were a lot of people in and out of the residence. RP (June 2, 2009) at 114.

White also denied having seen the wooden box the officers found in the southeast bedroom or knowing anything about the methamphetamine the officers found in the chair. White also testified that the officers had also searched the basement.

The State recalled Conroy to rebut White's testimony. Conroy testified that White had not told him that she was living in the basement. The State then asked Conroy whether anyone had found anything in the basement:

> [Prosecutor] During the course of the search, was anything found in the basement or garage that would have tied her into living in that area?
> [Conroy] No.

RP (June 2, 2009) at 136. On cross-examination, defense counsel asked Conroy if he had found in the southeast bedroom anything belonging to White other than the purse and its contents. Conroy responded that he had not found anything else of White's in the bedroom, but he stated that he did not do the majority of the searching.

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basement.

On redirect, the State asked Conroy: "Would it have been standard operating procedure for anyone executing that search on your behalf to come to you and let you know about evidence that would have related to the Defendant being in the basement?" RP (June 2, 2009) at 140. Defense counsel objected, arguing that the State was going beyond the scope of the cross-examination. When the trial court overruled the objection, Conroy then replied: "Nobody did, no." RP (June 2, 2009) at 140. Defense counsel did not object to this testimony as hearsay.

2. School Bus Route Stop Evidence

To prove that White had committed the offense within 1,000 feet of a school bus route stop, the State presented exhibit 1,[5] an aerial view map depicting several school bus route stops within 1,000 feet of 6106 Northeast 14th Court. Matt Deitemeyer, a technician for Clark County Department of Assessment, Geographic Information Systems (GIS), testified about generating the map using the Arc GIS software suite. He testified that Clark County had purchased the Arc GIS software in 1990; that the software was updated "almost annually since then;" that he had upgraded his computer about one-and-a-half months before the June 2009 trial; and that he had generated exhibit 1 on the day of trial. RP (June 1, 2009) at 12.

Cynthia Kidder, an assistant dispatcher for the Vancouver School District Transportation Department, testified that she had reviewed the aerial view map that morning and had located four school bus route stops within "the radius" of the residence. RP (June 1, 2009) at 67. She also testified that if a school bus route stop location changed, the district usually updated the Arc View

[5] The trial court admitted this exhibit; defense counsel did not object. The map is not part of the record on appeal.

map within 24 hours.

B. Verdict and Sentence

The jury found White guilty of possession of a controlled substance—methamphetamine, with intent to deliver. It also found that she had committed the offense within 1,000 feet of a school bus route stop designated by a school district. The school bus route stop enhancement increased White's standard sentencing range by 24 months,[6] from 12 to 20 months to 36 to 44 months. The trial court imposed a 36-month sentence.

The trial court also imposed several community custody conditions, including the following:

> Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.

Clerk's Papers (CP) at 28.

White appeals her conviction, the enhancement, and the above community custody condition.

[6] RCW 9.94A.533(6).

ANALYSIS

I. School Bus Route Stop Enhancement

White first argues that the evidence was insufficient to establish the school bus route stop enhancement because the State failed to present any evidence of where the school bus route stops were on the date of the offense. We agree.

We review a challenge to the sufficiency of the evidence by viewing the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt.[7] *State v. Bencivenga*, 137 Wn.2d 703, 706, 974 P.2d 832 (1999). A defendant's claim of insufficiency of the evidence admits the truth of the State's evidence and all inferences that can reasonably be drawn from the evidence. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Both circumstantial evidence and direct evidence are equally reliable. *Bencivenga*, 137 Wn.2d at 711; *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

"In determining whether the necessary quantum of proof exists, [we] need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that substantial evidence supports the State's case." *State v. Fiser*, 99 Wn. App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023 (2000). Substantial evidence is evidence that "'would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed.'" *State v. Prestegard*, 108

[7] To the extent the State is arguing that White failed to preserve this issue for review, the State is mistaken. White is not arguing that the trial court erred in admitting the evidence the State presented, she is raising a sufficiency of the evidence argument, and a defendant may raise a sufficiency argument for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 13, 904 P.2d 754 (1995).

Wn. App. 14, 23, 28 P.3d 817 (2001) (quoting *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972)).

Here, the State presented an aerial map and testimony establishing that there were several school bus route stops within 1,000 feet of the residence. But the State did not present any evidence suggesting that these school bus route stops were at those locations on the date of the offense. In fact, the State presented testimony that these stops changed often; that the maps were updated within 24 hours of such changes; and that the aerial view map had been generated shortly before trial—nearly a year after June 11, 2008. There was no testimony or other evidence establishing that the school bus route stops depicted on the map existed on the day of the offense. Because the State did not present any evidence showing where the school bus route stops were located on the day of the offense, the evidence is insufficient to support the enhancement.

The State appears to suggest that because White did not challenge exhibit 1's admissibility, it was prima facie evidence of the location of the school bus route stops under RCW 69.50.435(5).[8] At best, the State presented prima facie evidence of the school bus route stops

[8] RCW 69.50.435(5) provides:

> In a prosecution under this section, a map produced or reproduced by any . . . school district, [or] county . . . for the purpose of depicting the location and boundaries of the area on or within one thousand feet of any property used for a . . . school bus route stop, . . . or a true copy of such a map, shall under proper authentication, be admissible and *shall constitute prima facie evidence of the location and boundaries of those areas* if the governing body of the municipality, school district, county, or transit authority has adopted a resolution or ordinance approving the map as the official location and record of the location and boundaries of the area on or within one thousand feet of the . . . school bus route stop. . . . Any map approved under this section or a true copy of the map shall be filed with the clerk of the municipality or county, and shall be maintained as an official record of the municipality or county. This section shall not be construed as precluding the prosecution from introducing or relying upon any other evidence or

that existed on June 1, 2009, nearly a year after the offense. Even taking this evidence in the light most favorable to the State, there was a complete absence of evidence that any of the four school bus route stops within 1,000 feet of the residence existed on the day of the offense.

The State also suggests that although the aerial map was created in 1990, it showed that the school bus route stops still existed as of the date of trial. The State mischaracterizes the evidence. Although Deitemeyer testified that Clark County had been using the same mapping software since 1990 and that the software was updated regularly, the last time being a few weeks before the trial; he never testified that the same bus stops had existed since 1990. Kidder also testified that the maps were updated within 24 hours of any changes. Neither Deitemeyer nor Kidder testified that the school bus route stops shown on exhibit 1 had remained the same since 1990.

Because the State failed to present any evidence of the location of the school bus route stops on June 11, 2008, White's sufficiency argument has merit.

II. Ineffective Assistance of Counsel

White next argues that her trial counsel provided ineffective assistance of counsel by failing to object on hearsay grounds to Conroy's testimony that none of the other officers executing the search warrant told him that they had found any evidence related to White in the

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> testimony to establish any element of the offense. This section shall not be construed as precluding the use or admissibility of any map or diagram other than the one which has been approved by the governing body of a municipality, school district, county, transit authority, or public housing authority if the map or diagram is otherwise admissible under court rule.

(Emphasis added).

basement. We disagree.

Effective assistance of counsel is guaranteed by both the federal and state constitutions. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22. To prove ineffective assistance of counsel, White must first show deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). "Deficient performance is not shown by matters that go to trial strategy or tactics." *Hendrickson*, 129 Wn.2d at 77-78. White must also show prejudice—"'that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Hendrickson*, 129 Wn.2d at 78 (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). An appellant proves this second element "when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78. There is a strong presumption that trial counsel's performance was adequate, and exceptional deference must be given when evaluating counsel's strategic decisions. *Strickland*, 466 U.S. at 689.

Here, Conroy's comment that none of the other officers told him about finding any evidence in the basement that related to White was a non-responsive answer to the State's question about whether it have been standard operating procedure for other officers to report such evidence to him, and defense counsel could have reasonably opted to not emphasize this response by objecting to it. Additionally, defense counsel could have reasonably determined that this brief comment was less harmful than having the State present several additional officers to testify individually about what they had personally discovered when they searched the residence.

Because there are legitimate tactical reasons that could justify defense counsel's failure to object on hearsay grounds, White does not establish deficient representation.

Furthermore, Conroy had already testified that there was no evidence found in the basement or garage that tied White to those areas. This testimony was not hearsay, White's counsel did not object, and White does not argue on appeal that this testimony was inadmissible. Given that the jury had already heard that there was no evidence in the basement or garage related to White, Conroy's later statement was not prejudicial. Accordingly, White's ineffective assistance of counsel claim fails.

III. Community Custody Provision

Finally, White challenges the community custody provision stating:

> Defendant shall not possess or use any paraphernalia that can be used for the ingestion or processing of controlled substances or that can be used to facilitate the sale or transfer of controlled substances including scales, pagers, police scanners, and hand held electronic scheduling and data storage devices.

CP at 28. She argues that this provision (1) is not a valid crime related prohibition, and (2) is unconstitutionally vague.

Citing *State v. Zimmer*, 146 Wn. App. 405, 414, 190 P.3d 121 (2008), *review denied*, 165 Wn.2d 1035 (2009), the State concedes that this community custody provision "may not be totally supported as a crime related prohibition," and agrees that the entire provision should be struck. Br. of Resp't at 11. We accept the State's concession.

Accordingly, we vacate the school bus route stop enhancement, strike the above

community custody provision, and remand for resentencing without the school bus route stop enhancement. We otherwise affirm the conviction.

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

Alexander, J.P.T.

We concur:

Armstrong, J.

Worswick, A.C.J.