IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. REGINALD BELL, Appellant.	No. 39869-9-II UNPUBLISHED OPINION

Hunt, J. — Reginald Bell appeals his jury convictions and exceptional sentence for one count of possession of a controlled substance with intent to deliver and two counts of bail jumping. Bell argues that (1) the trial court erroneously denied his motion to suppress drug evidence that police found during a search of a motel room because he had automatic standing to challenge the search and the police lacked an articulable suspicion to detain him temporarily; and (2) the trial court's sentence of 240 months is excessive. In his Statement of Additional Grounds (SAG),[1] Bell asserts that (1) the trial court erred by denying his motion for arrest of judgment for his possession with intent to distribute conviction; (2) the State committed at least five instances of prosecutorial misconduct; (3) the trial court violated his speedy trial rights; (4) the trial court erroneously denied his motion for judgment notwithstanding the verdict for his bail jumping

[1] RAP 10.10.

convictions; and (5) his appellate counsel rendered ineffective assistance of counsel. We affirm.

FACTS

I. Background

On February 24, 2008, Shirley Butts was a registered guest at Tacoma's Norman Bates Motel. At 8:30 am, Butts and a friend were watching television in her motel room when Reginald Bell knocked on the door, "was being real loud outside," and asked if he could "hang out"; Butts agreed. 2 Verbatim Report of Proceedings (VRP) at 213, 210. Bell brought cocaine into the motel room, processed powder cocaine into "rock cocaine," and then allowed Butts to sample it; because she did not like it, he "recooked" some of the rock cocaine. 2 VRP at 214-15. Bell then started "cutting up" a ball of rock cocaine into "chunks." 2 VRP at 216.

At approximately 11:44 am, Fife Police Officer Robert Eugley received a call that there was a "customer problem" at the Bates Motel. 1 VRP at 67. When Eugley and Fife Police Officer Ryan Micenko responded, Eugley contacted the motel's desk clerk, Bonnie Baker, who advised him that there were "some guests overnight that had not checked in, or paid the overnight fee" in a motel room and "some heavy foot traffic in and out of" that motel room. 1 VRP at 67. Baker asked the police to make contact with the room.

As Bell was cutting up the rock cocaine into small pieces, the officers knocked on the door to Butts's motel room. When Bell heard the knock on the door, "he took everything and ran and hid it in [Butts's] closet, and put the ball [of rock cocaine] in [Butts's] shirt pocket [of a shirt hanging in the closet], and then he hid in the bathroom." 2 VRP at 216, 218. When there was no response, Micenko shouted, "[P]olice, come to the door," and Butts opened the door. 1 VRP at

68. When Eugley asked Butts if anyone else was present in the motel room with her, Butts initially replied that there was no one else. Butts then said that a man was in the bathroom, walked over to the bathroom, and told Bell to come out. After first refusing to come out of the bathroom, Bell then complied. Eugley and Micenko recognized Bell and addressed him as "Reginald" and "Mr. Bell." 2 VRP at 220.

Concerned for officer safety, Eugley asked Bell and Butts "if they could just both sit on the bed while [the officers] talked to them and explained to them why [the officers] were there"; Bell and Butts sat on the bed. 1 VRP at 68. Eugley and Micenko continued to stand outside the motel room doorway, with Eugley on one side of the door and Micenko on the other. As Eugley began to advise Butts that the motel desk clerk had reported "foot traffic and overnight guests," Butts "attempted to reach towards an item on the nightstand" that appeared to Eugley "to be a marijuana smoking pipe." 1 VRP at 69. Eugley ordered her to stop reaching for the pipe and to keep her hands where he could see them. Disobeying Eugley's command, Butts continued to reach for and then picked up the pipe. When Eugley asked Butts, "[W]hat is that[?]" Butts responded, "[I]t's a pipe." 1 VRP at 69. When Eugley asked Butts what she used the pipe for, Butts replied that it was for smoking marijuana.

Eugley then asked Butts if there was any marijuana in the room. Butts denied that there was. But when Micenko asked "if the marijuana was in the small canister that was sitting on the nightstand next to her," Butts confirmed that the canister did have marijuana in it, and then picked up the canister. 1 VRP at 69. Eugley twice ordered her to put the canister down; Butts failed to obey both times.

Believing that Butts was trying to conceal or to destroy evidence,[2] Eugley entered the room and advised Butts that she was under arrest, and read her *Miranda*[3] rights, which Butts stated she understood. When Eugley asked if other drugs or drug paraphernalia were in the room, Butts told Eugley "about a box underneath the table that she had stuff in." 1 VRP at 72. Butts admitted owning the box, which contained drug paraphernalia and a small amount of cocaine. When Eugley asked if there were "anything else in the room," Butts replied, "[I]t wasn't hers." 1 VRP at 72. Eugley obtained Butts's verbal consent for the officers to search the rest of the room; Butts also agreed to provide written consent. During this time, Bell remained seated on the bed.

Butts also told Eugley about "some crack cocaine in the room on the shelf by the bathroom above the coat rack." 1 VRP at 72. When Eugley searched this area, underneath a sweatshirt he found a "small plastic plate with what appeared to be suspected crack cocaine on it, small and large pieces, along with a folding knife that had [ ] residue on the tip of it," which belonged to Butts. 1 VRP at 73. The officers arrested Butts.

Eugley then observed "a plastic bag sticking out of a T-shirt pocket that had a whitish substance in it," "pulled it out and observed a fist size rock-type substance" that he believed to be crack cocaine. 1 VRP at 73. Butts informed Eugley that the shirt was hers but that the cocaine

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[2] According to Micenko, the motel room "was very cluttered"; Micenko believed that if Butts were to throw the small amount of marijuana somewhere in the room, the officers would not be able to find it. 1 VRP at 102. Micenko testified, for example, that "[Butts] could have crumbled [the marijuana] up and thrown it and [the officers] would have never found it." 1 VRP at 102.

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

belonged to Bell. At that point, Micenko arrested Bell. Searching Bell incident to his arrest, the officers found approximately $964 in Bell's pocket. In total, the police seized approximately 68 to 73 grams of crack cocaine with a street value of more than $6,000.

II. Procedure

The State charged Bell with unlawful possession of a Schedule II controlled substance with intent to deliver, RCW 69.50.401. The State later added two counts of bail jumping after Bell repeatedly failed to appear for various court hearings and his scheduled trial date. The second amended information also added an aggravating circumstance to all three charges: That the "operation of the multiple offense policy . . . results in a presumptive sentence that is clearly too lenient . . . and/or . . . the defendant has committed multiple current offenses and [Bell's] high offender score will result in some of the current offenses going unpunished." Clerk's Papers (CP) at 94-95.

A. Motion To Suppress

Following multiple continuances for cause, the trial court held a suppression hearing, at which Bell, Baker, and Officers Eugley and Micenko testified. Baker testified that (1) she had instructed Butts to register each guest with the motel office regardless of whether the guest was an overnight guest because "everyone [Butts] had coming to her room . . . wound up staying the night always," VRP (Sept. 9, 2009) at 12; and (2) Butts had not registered Bell as her guest on February 24, 2008. Micenko testified that he recognized Bell from previous contacts, including an arrest.

Bell testified that (1) he attempted to leave the motel room, but Officer Eugley "grabbed"

him and told him to sit on the bed next to Butts, VRP (Sept. 9, 2009) at 60; and (2) Officer Eugley stated to Butts, "'[A]ll you have to do is say this [the drug evidence] belongs to Mr. Bell and we'll let you go.'" VRP (Sept. 9, 2009) at 65. The trial court ruled that Bell's testimony was not credible. It orally denied Bell's motion to suppress. The trial court later entered written Findings of Fact and Conclusions of Law. In finding of fact 11, the trial court found:

> Officer Eugley asked Ms. Butts and [Bell] to sit on the bed. The officers remained outside the room by the doorway while Officer Eugley explained to Ms. Butts why the officers were there. . . . The officers remained on either side of the door and were not blocking the entrance. At no point did the officers draw their weapons, threaten to use force, physically restrain . . . Butts or [Bell], or otherwise indicate to Ms. Butts and [Bell] that they were not free to leave. At no point during the entire incident did [Bell] ask to leave, attempt to leave, get off the bed (until he was arrested at the conclusion of the incident), or otherwise indicate that he wanted to terminate his contact with the officers or leave the room.

CP at 271-72.

In conclusions of law 7 and 8, the trial court ruled that Bell did not have "automatic standing" to challenge the police's search of the hotel because (1) he "was not legitimately and lawfully on the premises where the search occurred" in light of an order prohibiting him from being in the area where the motel was located, and his failure to comply with the motel's "rules and policies regarding registering with the front desk," and (2) "he did not have a reasonable expectation of privacy in the premises because he was merely a 'casual visitor.'" CP at 278.

In conclusions of law 9 and 10, the trial court further ruled that, even if Bell had standing to challenge the search, the search was lawful because (1) the police had entered the motel room to prevent Butts from destroying evidence, an exigent circumstance; and (2) after the police arrested Butts and read her *Miranda* rights, Butts waived those rights and consented to the

police's search of her motel room. The trial court ruled in conclusion of law 11 that the police did not also need to seek Bell's consent to search because Bell was not a registered co-occupant of the motel room. Finally, in conclusion of law 12, the trial court ruled that "there was probable cause to arrest [Bell] for crimes relating to the possession of cocaine found in the room." CP at 279.

B. Motions To Dismiss

Acting pro se, Bell moved to dismiss his case under CrR 3.3(h), arguing that the State was violating his right to a speedy trial. Through his defense counsel, Bell moved a second time to suppress the evidence that the police had obtained during their search of the motel room, arguing that (1) he had standing to challenge the search; (2) the police did not have probable cause or a reasonable suspicion to believe Bell was involved in criminal activity; (3) the police had "exceeded their authority when they unlawfully contacted and entered" the motel room, CP at 17; and (4) Butts's consent to the police's search was based on "an illegal detention and entry" and therefore could not provide a legal basis for the search. CP at 20.

After law enforcement arrested him on a bench warrant for failure to appear, Bell, again acting pro se, moved to dismiss his case, asserting that his defense counsel had requested a 30-day continuance to which Bell objected. The record before us on appeal does not contain any ruling on this motion. Presumably, the trial court denied it. Later, again pro se, Bell moved to dismiss his case under CrR 8.3(b), alleging "arbitrary action or governmental misconduct" and citing the Fifth and Fourteenth Amendments to the United States Constitution and article I, section 3 of the state constitution. CP at 65. The record before us on appeal contains no rulings on these

motions.

Acting through his attorney, Bell filed a motion to dismiss his case under (1) CrRLJ 4.7(g)(7)(i), because the State allegedly failed to provide Butts's name and address, as CrR 4.7(a)(1)(i) requires; and (2) under CrRLJ 8.3(b) because the State allegedly did not provide him with "an accurate [sic] and/or current address" for Butts, which failure prejudiced his "right to a speedy trial and the right to be represented by counsel who has had sufficient opportunity to adequately prepare a material part of his defense." CP at 105 (emphasis omitted). Alternatively, Bell moved to exclude Butts's testimony at trial. The trial court denied both motions.

C. Motions in Limine

Bell also moved in limine to exclude certain evidence under ER 404(b), including the "SODA" Order[4] that excluded him from the geographic area encompassing the Norman Bates Motel. The trial court agreed to admit the SODA Order and its accompanying map under ER 404(b) but only "in a very limited sense": The trial court ordered that the State could not use the SODA Order "to prove the character" of Bell and could use it only "for the purpose of knowledge . . . and what did [Bell] know." 1 VRP at 48. The trial court further ordered the parties to refrain from referring to the prohibited area as "a drug activity area."[5] 1 VRP at 49.

[4] "SODA" stands for "stay out of the area of drug activity." 1 VRP at 35. A SODA Order is a sentencing condition that prohibits the person from entering or remaining in a particular area "for *any reason*." Ex. 6.

[5] Later acting pro se, Bell orally moved for the trial court to reconsider its ER 404(b) ruling, arguing that "there is strong evidence that suggest[s] that the [SODA Order] is a forged document." 1 VRP at 52. After granting Bell's counsel time to research the forgery issue during the lunch recess, which produced no evidence of forgery, the trial court denied Bell's motion to reconsider its ER 404(b) ruling.

D. Trial

The jury found Bell guilty of unlawful possession with intent to deliver a controlled substance under RCW 69.50.401, and guilty of both counts of bail jumping. At the close of trial, Bell moved for judgment notwithstanding the verdict on the bail jumping charges, arguing that the State did not provide sufficient evidence either that Bell had notice of his appearance dates or that Bell did not make an appearance. The trial court denied this motion.

E. Sentencing

On October 5, 2009, the trial court entered Findings of Fact and Conclusions of Law regarding Bell's sentencing that (1) Bell had an offender score of 15 for all three counts, (2) the standard range for the possession with intent to deliver conviction was "60+ to 120 months," and (3) the standard range for the bail jumping convictions was 51 to 60 months. CP at 187 (Findings of Facts (FF) III, IV). Citing former RCW 9.94A.535(2)(c) (2007), the trial court found that "[b]ecause of [Bell's] high offender score on all counts, some of his current offenses will go unpunished if a sentence within the standard range is imposed." CP at 187 (FF V). The trial court then ruled:

> Because of the presence of the above aggravating factor [former RCW 9.94A.535(2)(c)], and considering the purposes of the Sentencing Reform Act, sentencing with[in] the standard range is not an appropriate sentence. RCW 9.94A.589(1)(a) authorizes a court to impose consecutive sentences for multiple current offenses when an aggravating factor has been found under [former] RCW 9.94A.535(2)(c). The court therefore ORDERS that the sentence for [the possession with intent to deliver and bail jumping convictions] be served CONSECUTIVELY to each other and all other sentences. The precise period of confinement for these counts are set forth in the judgment and sentence.

CP at 188 (FF VI). The trial court also concluded, "[T]here are substantial and compelling

reasons justifying an exceptional sentence outside the standard range." CP at 188 (Conclusion of Law (CL) I). The trial court sentenced Bell to 120 months of confinement for possession with intent to distribute and 60 months for each bail jumping conviction. The trial court also ordered Bell to serve these three sentences consecutively.

F. Pro Se Post-trial Motions

After sentencing, Bell filed two additional pro se motions: a motion for an arrest of judgment under CrR 7.4(a)(3) and a motion for a new trial under CrR 7.5(a). He argued that there was insufficient evidence to satisfy the "actual . . . [or] constructive possession" element of his possession with intent to distribute charge. CP at 229. He argued for a new trial because (1) the prosecutor had committed misconduct by referring to Bell's SODA Order during closing argument, introducing "false evidence with regard to the court order that was not issued by a court," "telling jury, in effect, that . . . Bell was a street level crack dealer," and "by arguing in closing a profit motive when there [wasn't] any evidence of such"; (2) the trial court erred in denying Bell's motion to reconsider its ER 404(b) ruling; (3) "substantial justice ha[d] not been done in that the prosecution had previously convicted . . . Butts of possessing the same unlawful contraband"; and (4) the State had made "inconsistent prosecutorial positions and inconsistent assertion[s] of facts in arguing that . . . Butts possessed the cocaine in State v. Butts and in State v. Bell[;] Bell possessed the cocaine and then using Butts as a witness to provide testimony diametrically opposite than [sic] the testimony in State v. Butts." CP at 236-38. The record before us on appeal does not contain any ruling on these motions.

Bell appeals.

ANALYSIS

I. Denial of Motion To Suppress

Bell first argues that the trial court erroneously denied his motion to suppress because (1) the police lacked a lawful basis to seize him; (2) accordingly, they seized him unlawfully when

they asked him to sit on the bed with Butts; and (3) therefore, the subsequent search of the motel room and seizure of evidence were unlawful. Bell asserts that he has automatic standing to bring this challenge because he was in constructive possession of the cocaine the police discovered in the motel room. Assuming, without deciding, that Bell has automatic standing to raise these challenges, we hold that the police did not seize Bell and that the trial court did not err in denying his motion to suppress.

We review the trial court's denial of a motion to suppress to determine whether substantial evidence supports the factual findings and, if so, whether the findings support the conclusions of law. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). We review the trial court's conclusions of law de novo. *Garvin*, 166 Wn.2d at 249. A seizure occurs when a law enforcement officer uses physical force or displays of authority to restrain a suspect's freedom of movement such that a reasonable person would not believe he is free to leave under the circumstances or free to decline the officer's request or to terminate the encounter. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). A seizure does not occur, however, when the police initiate contact "without duress or compulsion." *State v. Harrington*, 167 Wn.2d 656, 665, 222 P.3d 92 (2009).

Based on the suppression hearing, the trial court found that (1) the officers "asked Ms. Butts and [Bell] to sit on the bed"; (2) "[t]he officers . . . were not blocking the entrance" to the motel room; (3) "[a]t no point did the officers draw their weapons, threaten to use force, physically restrain Ms. Butts or [Bell], or otherwise indicate to Ms. Butts and [Bell] that they were not free to leave"; and (4) "[a]t no point during the entire incident did [Bell] ask to leave,

attempt to leave, get off the bed . . . or otherwise indicate that he wanted to terminate his contact with the officers or leave the motel room." CP at 271-72. Bell does not challenge these findings of fact on appeal;[6] thus, we treat them as verities. *State v. Eriksen*, 170 Wn.2d 209, 215 n.4, 241 P.3d 399 (2010).

Given these unchallenged findings of fact, we hold that, under the circumstances, law enforcement did not restrain Bell's freedom of movement and that a reasonable person would have believed he was free to leave the motel room or free to decline the officers' request and to terminate the encounter. *O'Neill*, 148 Wn.2d at 574. Accordingly, we affirm the trial court's denial of Bell's motion to suppress.

II. Exceptional Sentence

Bell next argues that the trial court's exceptional sentence of 240 months of confinement is clearly excessive because, according to Bell, "20 years of confinement for non-violent class B and class C felonies is clearly excessive." Br. of Appellant at 21. We disagree.

The "abuse of discretion" standard applies to our review of whether an exceptional sentence is clearly excessive. *State v. Kolesnik*, 146 Wn. App. 790, 805, 192 P.3d 937 (2008), *review denied*, 165 Wn.2d 1050 (2009). A "'clearly excessive'" sentence is one that is clearly unreasonable, "'i.e., exercised on untenable grounds or for untenable reasons, or an action that no reasonable person would have taken.'"[7] *Kolesnik*, 146 Wn. App. at 805 (quoting *State v.*

[6] RAP 10.3(g) requires the appellant to include in his brief a "separate assignment of error for each finding of fact [he] contends was improperly made," including "reference to the finding by number."

[7] When a sentencing court bases an exceptional sentence on tenable reasons, however, we rule that sentence excessive only if its length, in light of the record, "'shocks the conscience.'"

Ritchie, 126 Wn.2d 388, 393, 894 P.2d 1308 (1995) (internal quotation marks omitted)). We find no such abuse here.

To justify ordering Bell to serve his multiple sentences consecutively under RCW 9.94A.589(1)(a), the trial court found a "substantial and compelling reason[] justifying an exceptional sentence" that exceeded "the standard sentencing range"—that Bell "ha[d] committed multiple current offenses and the defendant's high offender score [would otherwise result] in some of the current offenses going unpunished." CP at 187, 188 (quoting former RCW 9.94A.535(2)(c)). Neither the law nor the facts here support Bell's argument that the resulting 240 months of total confinement is "clearly above and beyond the length of time that the Legislature deemed appropriate punishment for these crimes." Br. of Appellant at 21.

If a trial court does not impose an exceptional sentence in these circumstances, then a defendant with an offender score higher than 9 (the highest score that RCW 9.94A.510 contemplates), like Bell, whose offender score was 15, does not receive any greater punishment than a defendant with an offender score of exactly 9. A standard-range sentence in this instance "would not be proportionate to the seriousness of the offense, promote respect for the law, or be commensurate with the punishment imposed on others committing similar offenses." *State v. Garnier*, 52 Wn. App. 657, 664, 763 P.2d 209 (1988), *overruled on other grounds by State v. Stephens*, 116 Wn.2d 238, 803 P.2d 319 (1991); *see also State v. Brundage*, 126 Wn. App. 55, 66-67, 107 P.3d 742 (2005), *review denied*, 157 Wn.2d 1017 (2006).

Kolesnik, 146 Wn. App. at 805 (quoting *State v. Vaughn*, 83 Wn. App. 669, 681, 924 P.2d 27 (1996) (internal quotation marks omitted)). A sentence that shocks the conscience is one that "no reasonable person would adopt." *State v. Halsey*, 140 Wn. App. 313, 324-25, 165 P.3d 409 (2007).

For defendants with very high offender scores, often times the "presumption of concurrent sentencing" under RCW 9.94A.589(1)(a) results in an actual sentence that does not reflect the deserved punishment. *State v. Vance*, 168 Wn.2d 754, 760, 230 P.3d 1055 (2010); *Stephens*, 116 Wn.2d at 244-45. Thus,"[s]omething more is required" to impose an appropriate sentence. *Stephens*, 116 Wn.2d at 243. Our legislature responded by authorizing consecutive sentences under RCW 9.94A.589(1)(a), the imposition of which is left to the "total discretion" of the trial court. *State v. Linderman*, 54 Wn. App. 137, 139, 772 P.2d 1025 (1989), *review denied*, 113 Wn.2d 1004 (1989).[8] We hold that the trial court did not abuse its discretion here in running Bell's sentences consecutively.

III. Statement of Additional Grounds (SAG)

Bell next asserts five additional grounds for reversal of his convictions and exceptional sentence: (1) The trial court erred by denying his motion for arrest of judgment on his possession with intent to distribute conviction; (2) the State engaged in several instances of prosecutorial misconduct; (3) the trial court violated his speedy trial rights; (4) the trial court erroneously denied his motion for judgment notwithstanding the verdict on his bail jumping convictions; and (5) his appellate counsel rendered ineffective assistance. None of these assertions merit reversal.

A. Denial of Motion for Arrest of Judgment

The record does not support Bell's contention that the State failed to provide sufficient

[8] *See also State v. Grayson*, 130 Wn. App. 782, 786, 125 P.3d 169 (2005) ("'A sentencing judge has unfettered discretion to impose any sentences . . . either concurrently with, or consecutively to, a prior sentence for multiple current offenses.'") (quoting *In re Personal Restraint of Long*, 117 Wn.2d 292, 305, 815 P.2d 257 (1991)).

evidence that he had constructive possession of the cocaine that police found in Butts's motel

room.[9] A defendant may move to arrest the judgment under CrR 7.4(a)(3) because of "insufficiency of the proof of a material element of the crime." Reviewing denial of a motion for arrest of judgment requires us to engage in the same inquiry as the trial court. *State v. Ceglowski*, 103 Wn. App. 346, 349, 12 P.3d 160 (2000). The evidence presented in a criminal trial is legally sufficient to support a guilty verdict if any rational trier of fact, viewing the evidence in a light most favorable to the State, could find the essential elements of the charged crime beyond a reasonable doubt. *State v. Longshore*, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000). "'A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.'" *Ceglowski*, 103 Wn. App. at 349 (quoting *State v. Salinas*, 119 Wn. 2d 192, 201, 829 P.2d 1068 (1992)). We review a trial court's decision on a motion for arrest of judgment under an abuse of discretion standard. *State v. Meridieth*, 144 Wn. App. 47, 53, 180 P.3d 867 (2008). We find no such abuse of discretion here.

Bell argues that we should analogize to *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969), in which our Supreme Court reversed a defendant's narcotics possession conviction, holding that "there was insufficient evidence for the jury to find that the defendant had

[9] Bell actually argues that the State "did not meet its burden of establishing *any* of the elements" of the possession with intent to deliver charge, SAG at 5 (emphasis added), but Bell provides argumentation only for the "possession" element. *See* RCW 69.50.401(1) ("Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.")

constructive possession of the drugs." *Callahan*, 77 Wn.2d at 32;[10] SAG at 10. But Bell overlooks a major component of *Callahan*'s analysis: After discussing the lack of indicia of dominion or control, our Supreme Court underscored clear evidence that another person had admitted at trial that "the drugs belonged to him," that "he had brought them on the boat," and "that he had sole control over them."[11] *Callahan*, 77 Wn.2d at 31. Based on these uncontroverted facts, our Supreme Court concluded:

> Evidence pointing to any dominion or control [Callahan] might have over the drugs was purely circumstantial and it is not within the rule of reasonable hypothesis to hold that proof of possession by [Callahan] may be established by circumstantial evidence *when undisputed direct proof places exclusive possession in some other person*.

Callahan, 77 Wn.2d at 31-32 (emphasis added).

Here, unlike in *Callahan*, in addition to circumstantial evidence of Bell's possession of the

[10] Law enforcement officers executing a search warrant on a houseboat found Callahan and another person sitting at a desk that had "various pills and hypodermic syringes" on it and a cigar box with narcotics on the floor between the Callahan and the other man; they discovered more narcotics throughout the kitchen and bedroom areas. *Callahan*, 77 Wn.2d at 28. Callahan admitted (1) possessing firearms, two books on narcotics, and a set of broken scales; (2) having handled the drugs earlier that day; and (3) having stayed on the houseboat for two to three days before his arrest, which he later denied during trial. *Callahan*, 77 Wn.2d at 28. Holding that these facts were insufficient to support a theory of constructive possession, our Supreme Court explained:

> Although there was evidence that [Callahan] had been staying on the houseboat for a few days there was no evidence that he participated in paying the rent or maintained it as his residence. Further, there was no showing that [Callahan] had dominion or control over the houseboat. The single fact that he had personal possessions, not of the clothing or personal toilet article type, on the premises is insufficient to support such a conclusion.

Callahan, 77 Wn.2d at 31.

[11] Testimony from several others corroborated these facts. *Callahan*, 77 Wn.2d at 31.

cocaine, the State presented direct evidence of his dominion and control over the cocaine: At trial, Butts testified, "Reginald Bell came to my door at 8:30 on February 24th . . . and he brought cocaine into the room." 2 VRP at 210. Moreover, again unlike *Callahan*, the record here contains no evidence that any person other than Bell had exclusive possession of the cocaine.[12] Nor does Bell's argument that Butts had domain and control over the motel room undercut the undisputed other evidence of his possession and control of the cocaine.[13] Here, there was direct uncontroverted evidence that Bell brought the cocaine into the motel room, differing markedly from the undisputed evidence in *Callahan* that the drugs belonged to someone other than the defendant. We hold that, viewing the evidence in a light most favorable to the State, a rational trier of fact could find beyond a reasonable doubt that Bell exercised dominion and control over the cocaine, and, therefore, the trial court did not err in denying Bell's motion to arrest judgment.

[12] Although Bell argues to the contrary that Butts had sole possession of the cocaine, most of these asserted facts do not support his argument. For example, Bell's cites Butts's testimony that after the Bell made bail, he returned to the motel room to retrieve his DVD player. SAG at 10 (citing 2 VRP at 242-43); this fact is irrelevant to the issue of his constructive possession of the cocaine.

[13] The dominion and control aspect of constructive possession does not require exclusive control. *State v. Nyegaard*, 154 Wn. App. 641, 647, 226 P.3d 783 (2010); *see also State v. George*, 146 Wn. App. 906, 920, 193 P.3d 693 (2008) ("[M]ore than one defendant may be in possession of the same prohibited item.")

B. Untimely Allegations of Prosecutorial Misconduct

Bell attempts, contrary to RAP 2.5(a), to raise numerous claims of prosecutorial misconduct for the first time on appeal.[14] *See* SAG at 13-15. But Bell does not show that any of his allegations of prosecutorial misconduct were "so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." *State v. Belgarde*, 110 Wn.2d 504, 507, 755 P.2d 174 (1988) (citations omitted). Therefore, we do not further address these allegations.

C. Speedy Trial

Bell argues that the trial court violated his constitutional speedy trial rights by continuing the trial seven times between April 7 and September 15, 2009.[15] Bell bases his argument on CrR 3.3(b)(1)(i), which requires trial to begin within 60 days of arraignment if the defendant is in custody. The record shows, however, that the trial court validly ordered the continuances under CrR 3.3(f) for appropriate reasons, such as allowing for time for counsel to interview witnesses and the lack of open courtrooms, and, therefore, did not violate CrR 3.3(b)(1)(i). Nor does Bell show that these continuances violated his constitutional rights to a speedy trial under U.S. Const. amend. VI or Wash. Const. art. I, §22.

[14] These allegations of prosecutorial misconduct include: (1) the State's decision to charge Bell with possession with intent to deliver; (2) the State's forcing Butts to "conjure testimony" that Butts witnessed Bell handling the cocaine; (3) the State's rendering Butts "unavailable for interviews prior to trial so that the substance of her testimony cannot be determined prior to trial"; (4) the State's submitting a forged SODA Order; and (5) the State's use of Officer Micenko's "perjured testimony." SAG at 13-15.

[15] Bell objected to each of the seven continuances, but his attorney signed each one.

D. Judgment Notwithstanding the Verdict

Bell next contends that the trial court erred by denying his motion for judgment notwithstanding the verdict on his bail jumping convictions because (1) the State failed to provide sufficient evidence that he was aware of his appearance dates or (2) alternatively, the State failed to establish that Bell actually did not show up to his appearances. The record supports neither contention.

The trial court should not grant a motion for a judgment notwithstanding the verdict unless the court can say, as a matter of law, that there is neither evidence nor reasonable inferences from it sufficient to sustain the verdict. *McGreevy v. Oregon Mut. Ins. Co.*, 74 Wn. App. 858, 866, 876 P.2d 463 (1994), *aff'd*, 128 Wn.2d 26 (1995). The court must accept the truth of the nonmoving party's evidence and draw all reasonable inferences in the light most favorable to the party that moves for a judgment notwithstanding the verdict. *McGreevy*, 74 Wn. App. at 866. The court may grant the motion only when there is no competent evidence or reasonable inference that would sustain a verdict for the nonmoving party. *McGreevy*, 74 Wn. App. at 866. Such is not the case here.

The scheduling order that set Bell's pretrial conference date for March 11, 2008 (for which Bell did not appear) appears to bear Bell's signature. Ex. 18. The continuance order that rescheduled Bell's trial for August 14, 2008 (for which Bell also did not appear), has the words "refused to sign" above Bell's signature line. Ex. 27. Although Bell disputes the authenticity of these documents,[16] we cannot say that "there is no competent evidence or reasonable inference"

[16] The proper method for seeking court consideration of matters outside the record is through a personal restraint petition under RAP 16.4.

to sustain the jury's two convictions for bail jumping. *McGreevy*, 74 Wn. App. at 866. We hold, therefore, that the trial court did not err by denying Bell's motion for judgment notwithstanding the verdict.

E. Ineffective Assistance of Appellate Counsel

To prevail on an ineffective assistance of appellate counsel claim, the appellant must demonstrate merits of issues that counsel failed to argue or argued inadequately. *In re Personal Restraint Petition of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994), *cert. denied*, 513 U.S. 849 (1994). As we explained above, all of Bell's SAG issues are without merit. Thus, we hold that Bell's appellate counsel did not render ineffective assistance by failing to raise those issues in his appellant's brief.

We affirm.

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:

Penoyar, C.J.

Worswick, J.