IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,	)	No. 30743-3-III
Respondent,	)	
v.	)	
THOMAS DOUGLAS REYNOLDS,	)	
Appellant.	)	UNPUBLISHED OPINION

Siddoway, J. — Thomas Reynolds was convicted of delivering a controlled substance after selling twenty dollars' worth of heroin to a confidential informant in a controlled buy. He assigns error to trial rulings addressing the competency of the confidential informant (a heroin user) to testify, to a detective's testimony that unidentified sources corroborated the identification of Mr. Reynolds as a drug dealer, and to problems with recording equipment leading to an allegedly inadequate record for his appeal. He also claims ineffective assistance of counsel and trial error in the sentencing hearing. We find no error and affirm.

FACTS AND PROCEDURAL BACKGROUND

Thomas Reynolds was charged with violating the Uniform Controlled Substances Act, chapter 69.50 RCW, after selling twenty dollars' worth[1] of heroin to Edward Fairman, a confidential informant for the Longview Police Department. The amended information alleged that the sale occurred within 1,000 feet of a school bus route stop in violation of RCW 69.50.435(1)(c).

At trial, Detective Brian Streissguth testified that Mr. Reynolds was selected as a target of a controlled buy after Mr. Fairman told officers that Mr. Reynolds was someone from whom he could purchase drugs, information that was consistent with knowledge gained by the detective from other sources. When questioned about corroboration, the detective testified:

> Q . . . [A]s part of your job and duties as a street crimes detective, do you, I guess, keep up with the information of what's going on in the community?
> A Definitely. I work with several different informants who provide intelligence on a daily basis.
> Q Okay. So part of your job is knowing who's who in the drug community?
> A Correct.
> Q Okay. And so, would it be fair to say, then, that you take the list [of targets] that [Mr. Fairman] provides and then you cross-reference that with the intelligence you already have?
> A Definitely.
> [DEFENSE COUNSEL]: Objection. Hearsay.
> THE COURT: Overruled.
> A Definitely.

[1] The quantity of heroin sold was never established during trial. The parties operated under the assumption at sentencing that the amount was 0.12 grams.

> Q Okay. And so that was what ultimately identified in this case. You decided to go after Mr. Reynolds and he was on the list?
> A Correct.

Report of Proceedings (RP) (Dec. 6, 2010) at 37-38. In addition to lodging the hearsay objection, Mr. Reynolds objected to the testimony on the basis that it violated his Sixth Amendment right to confrontation. The State defended the testimony as being offered for the nonhearsay purpose of establishing why the detective investigated Mr. Reynolds. The objections were overruled.

The State also called Mr. Fairman as a witness, but before he could testify, defense counsel challenged his competency, representing to the court that Mr. Fairman admitted to him that he had used heroin that morning. The trial court conducted a brief competency hearing outside the presence of the jury, in which Mr. Fairman admitted that he was addicted to heroin and had consumed a tenth of a gram approximately six hours earlier. He explained that a dose of that amount was a maintenance level, that "just keeps you from gettin' sick." *Id.* at 97. He testified that he did not feel like he was under the effects of the drug and was having no difficulty understanding the proceedings. The trial court found him competent to testify.

Upon being called, Mr. Fairman testified that both Mr. Reynolds and Mr. Reynolds' girl friend, Michelle Green, were present and participated in discussions about his purchase of the heroin, but that it was Mr. Reynolds whom he paid and who handed

him the drugs. Mr. Fairman had worn a wire during the purchase and an audio compact disc (CD) of the recorded transaction had been admitted as an exhibit. The State played the recording during Mr. Fairman's testimony. No one objected to the quality of the recording or expressed concern that it was difficult to understand. As it was played, Mr. Fairman identified the three voices on the recording as belonging to Mr. Reynolds, Ms. Green, and himself. He also identified for the jury when, during the playback of the recording, Mr. Reynolds told him he had twenty dollars' worth of heroin for sale.

Ms. Green was the only defense witness. She claimed that she was the one who sold the heroin to Mr. Fairman, that Mr. Reynolds was not involved, and that she had already pleaded guilty for the crime.

The jury found Mr. Reynolds guilty and, by special verdict, found that the delivery occurred within 1,000 feet of a school bus route stop. At sentencing, defense counsel requested an exceptional downward sentence of 20 months based upon the small amount of heroin involved. The State argued for a sentence at the high end of the standard range based upon Mr. Reynolds' criminal history and the fact that only five years earlier, he had received an exceptional downward sentence pursuant to a plea deal. The trial court questioned defense counsel about the possibility of a DOSA[2] sentence, to which defense counsel responded,

[2] Drug offender sentencing alternative, RCW 9.94A.660.

> Well, Your Honor, he does [qualify]. But that would actually involve a sentence of, you know, a hundred months. And I personally feel, and I've advised my client to this, that that is still disproportionate with what he was convicted of doing.
>
> THE COURT: Okay.
>
> [DEFENSE COUNSEL]: You know, a DOSA sentence, if he was eligible for residential DOSA at any point, we would have likely asked for that. But a prison-based DOSA, he would do, you know, half the mid range of, you know, basically 105 months or a 104 months.

RP (Dec. 21, 2010) at 247.

The court rejected the request for an exceptional sentence downward, reasoning that the small amount of drugs involved was typical for the offense. In imposing a low-end sentence of 84 months plus 12 months of community custody, the court noted that "[Mr. Reynolds] did 40 months before and he didn't learn. He sold then and he sold again." *Id.* at 253.

Mr. Reynolds timely appealed.

ANALYSIS

Mr. Reynolds argues on appeal that the trial court abused its discretion by finding Mr. Fairman competent to testify despite his having used heroin earlier in the day and by allowing Detective Streissguth to testify that Mr. Fairman's identification of Mr. Reynolds as a drug dealer was consistent with information known by the detective from other, unidentified, sources. He also argues that the verbatim report of proceedings, which was prepared from a videotape of the trial, is constitutionally inadequate because

approximately 126 omissions, characterized as "inaudible," appear in the portion of the transcript reporting the playing of the audio CD of the wire recording. He also argues that in light of the shortcomings of the report of proceedings, insufficient evidence supports the conviction. Finally, he complains of sentencing error, arguing that the trial court improperly denied his request for an exceptional downward sentence, and that his lawyer was ineffective in failing to pursue a DOSA sentence.

We first address his assignments of error relating to the trial and then turn to his challenges to the sentencing hearing.

I

Mr. Reynolds alleges two problems with the trial court's ruling on Mr. Fairman's competency to testify: first, that the court abused its discretion in finding Mr. Fairman competent and, second, that it violated his Sixth Amendment right to confrontation by limiting his cross-examination of Mr. Fairman during the competency hearing.

A reviewing court will not disturb a determination that a witness is competent to testify absent a showing of manifest abuse of discretion. *Faust v. Albertson*, 167 Wn.2d 531, 546, 222 P.3d 1208 (2009). The same manifest abuse of discretion standard applies to our review of a court's limitation on the scope of cross-examination. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). A trial court abuses its discretion when an order is manifestly unreasonable or based on untenable grounds. *State v. Rafay*, 167

Wn.2d 644, 655, 222 P.3d 86 (2009). A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported in the record or was reached by applying the wrong legal standard. *State v. Thompson*, 173 Wn.2d 865, 870, 271 P.3d 204 (2012).

Witness Competency Under RCW 5.60.050

Witnesses are incompetent to testify if they are (1) "of unsound mind, or intoxicated at the time of their production for examination," or (2) "appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly." RCW 5.60.050(1)-(2). All witnesses are presumed competent until proved otherwise by a preponderance of evidence. *State v. Brousseau*, 172 Wn.2d 331, 341, 259 P.3d 209 (2011). The burden of proving incompetency is on the party challenging the competency of the witness. *Id*. Witness competency determinations rest primarily with the trial judge who "'sees the witness, notices his manner, and considers his capacity and intelligence.'" *State v. Swan*, 114 Wn.2d 613, 645, 790 P.2d 610 (1990) (quoting *State v. Allen*, 70 Wn.2d 690, 692, 424 P.2d 1021 (1967)).

Mr. Reynolds argues that Mr. Fairman should have been excluded as incompetent to testify, because he was "intoxicated at the time of [his] production for examination." RCW 5.60.050(1). The statute does not define the term "intoxicated." *Webster's Third New International Dictionary* 1185 (1993) defines it as "being under the marked

influence of an intoxicant." Our Supreme Court interprets the term consistent with this definition, requiring that a disqualified witness display signs of actually being under the influence of an intoxicating substance, not merely have an intoxicating substance present in his or her system. *Faust*, 167 Wn.2d at 546 (finding no abuse of discretion in permitting a witness with alcohol on his breath to testify where there was "no indication that [the witness] was under the influence of or affected by alcohol").

During the hearing conducted to determine his competency, Mr. Fairman cogently testified about his history of heroin addiction, current heroin use, and the nature of the trial proceedings. His admission that he consumed a maintenance dose of heroin in the morning in order to "keep from gettin' sick" was not sufficient to establish intoxication. He testified that he was not adversely affected by the dose and that he could understand the proceedings. Mr. Reynolds, who bore the burden of establishing Mr. Fairman's incompetency to testify, produced no evidence refuting this testimony.

The trial court was well within its discretion in determining that Mr. Fairman was a competent witness.

Limitation of Cross-Examination

Mr. Reynolds argues that if his evidence of Mr. Fairman's incompetency was insufficient, it was because the trial court foreclosed inquiry by defense counsel during the competency hearing, in violation of his Sixth Amendment right to confrontation. He

fails to identify for us, in the record, where the alleged limitation occurred. Our own review of the record reveals that the trial court afforded Mr. Reynolds the opportunity to explore the competency issue:

> THE COURT: . . . Competency to testify is, you know, is a pretty low standard, actually. So do you have [additional] questions about [Mr. Fairman's] ability to recall or speak or?
> [DEFENSE COUNSEL]: No other questions.
> THE COURT: And if you want to lay your foundation, I guess, for the purposes of appeal, I'll let you continue to ask.
> (ATTORNEY/CLIENT DISCUSSION OFF THE RECORD)
> [DEFENSE COUNSEL]: I have no other questions, Your Honor.

RP (Dec. 6, 2010) at 101. Mr. Reynolds has failed to demonstrate that the trial court limited his cross-examination of Mr. Fairman or that it precluded him from raising the competency issue again if Mr. Fairman appeared impaired during his testimony before the jury.[3]

II

Mr. Reynolds next argues that Detective Streissguth's reference to unidentified informants corroborating Mr. Fairman's identification of Mr. Reynolds as a drug dealer

[3] A case relied upon by Mr. Reynolds, *United States v. Crosby*, 149 U.S. App. D.C. 306, 462 F.2d 1201 (1972), is distinguishable. In that case, the trial court refused defense counsel's request to subpoena pertinent hospital records as an aid to determining the competency of a witness who was a narcotics addict and who had used on the day of trial. *Id*. at 1202. The reviewing court deemed the refusal an abuse of discretion because it prevented the trial court from learning all of the facts relevant to its exercise of discretion. *Id*. at 1203. Here the trial court was not asked to consider any records and made its ruling based upon all of the considerations advanced by the parties.

violated his confrontation clause rights.[4] We review alleged violations of the confrontation clause de novo. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 644, 145 P.3d 406 (2006).

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. In *Crawford v. Washington*, 541 U.S. 36, 59, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that where a witness is absent, but the State wishes to present his or her prior testimonial statements at trial, it can do so only if the witness is truly unavailable and the defendant has had a prior opportunity for cross-examination.

The primary guarantee of the confrontation clause is the right to effective cross-examination of adverse witnesses. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974); *State v. Foster*, 135 Wn.2d 441, 456, 957 P.2d 712 (1998). However, "'[w]hen out-of-court assertions are used for nonhearsay purposes, no confrontation clause concerns arise.'" *State v. Rangel-Reyes*, 119 Wn. App. 494, 498, 81 P.3d 157 (2003) (quoting *State v. Neslund*, 50 Wn. App. 531, 556, 749 P.2d 725 (1988)); *see also Crawford*, 541 U.S. at 59 n.9 ("The [Confrontation] Clause . . . does not bar the

[4] The transcript omits the court's ruling on the confrontation clause objection, which occurred during a bench conference.

use of testimonial statements for purposes other than establishing the truth of the matter asserted.").

The State argues that Detective Streissguth's testimony does not implicate the confrontation clause because it was offered for the nonhearsay purpose of explaining how Mr. Reynolds became the target of a controlled buy, not to establish that he was a drug dealer. Statements "'provided merely by way of background,' or to explain simply why the Government commenced an investigation, is not offered for the truth of the matter asserted and, therefore, does not violate a defendant's Sixth Amendment rights." *United States v. Powers*, 500 F.3d 500, 508 (6th Cir. 2007) (quoting *United States v. Cromer*, 389 F.3d 662, 676 (6th Cir. 2004)); *and see, e.g.*, *State v. Mason*, 127 Wn. App. 554, 566, 126 P.3d 34 (2005) (concluding that an officer's testimony regarding the victim's description of the criminal incident was not being admitted to prove the truth of the matter asserted, but was being offered to explain why the police officer took action), *aff'd on other grounds*, 160 Wn.2d 910, 162 P.3d 396 (2007).

We need not decide whether the detective's testimony as to his other sources of knowledge violated the confrontation clause, however, because even if it did, it was harmless.

"It is well established that constitutional errors, including violations of a defendant's rights under the confrontation clause, may be harmless." *State v. Moses*, 129

Wn. App. 718, 732, 119 P.3d 906 (2005); *Harrington v. California*, 395 U.S. 250, 251-52, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969). "[C]onstitutional error is presumed to be prejudicial and the State bears the burden of proving that the error was harmless." *State v. Watt*, 160 Wn.2d 626, 635, 160 P.3d 640 (2007). In Washington, a confrontation clause violation is considered harmless if "the untainted evidence is so overwhelming that it necessarily leads to a finding of the defendant's guilt." *State v. Koslowski*, 166 Wn.2d 409, 431, 209 P.3d 479 (2009); *see also Mason*, 160 Wn.2d at 927 (recognizing that error is not harmless in such cases if there is a "'reasonable probability that the outcome of the trial would have been different had the error not occurred'" (quoting *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995))).

The detective's testimony to unidentified corroboration of Mr. Reynolds' drug dealing was of little import when viewed against the evidence of Mr. Reynolds' participation in the sale with which he was charged. The detective's sources of intelligence were addressed only once during his testimony and went unmentioned by both the State and the defense during closing argument. By comparison, evidence of Mr. Reynolds' involvement in the heroin sale was presented through the testimony of Detective Streissguth; the testimony of Mr. Fairman; the audio recording of the transaction; and even, to some extent, by the testimony of Ms. Green, who—while vouching for Mr. Reynolds' innocence—nonetheless placed him at the scene. There is no

reasonable probability that the outcome of the trial would have been different had the challenged testimony been excluded.

III

Mr. Reynolds next claims that the trial transcript produced for this appeal is constitutionally deficient because a substantial portion of the wire recording played for the jury was transcribed as "inaudible." He contends that the deficiency in the recording impedes his ability to challenge the sufficiency of the evidence supporting his conviction.

"A criminal defendant is constitutionally entitled to a 'record of sufficient completeness' to permit effective appellate review of his or her claims." *State v. Thomas*, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S. Ct. 917, 8 L. Ed. 2d 21 (1962)). However, a "record of sufficient completeness" does not necessarily mean a complete verbatim transcript. *Id*. at 299. Other methods of providing a record of trial proceedings are constitutionally permissible "'if they place before the appellate court an equivalent report of the events at trial from which the appellant's contentions arise.'" *State v. Jackson*, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976) (quoting *Draper v. Washington*, 372 U.S. 487, 495, 83 S. Ct. 774, 9 L. Ed. 2d 899 (1963)).

A new trial will seldom be required when a report of proceedings is lost—in most cases, a reconstructed record will provide the defendant with a record of sufficient

completeness for effective review. *State v. Tilton*, 149 Wn.2d 775, 785, 72 P.3d 735 (2003). The absence of a portion of the record is not reversible error unless the defendant can demonstrate prejudice. *See State v. Miller*, 40 Wn. App. 483, 488-89, 698 P.2d 1123 (1985).

The usual remedy for a defective record is to supplement it with appropriate affidavits and have any discrepancies resolved by the judge that heard the case.[5] RAP 9.5(c); *Tilton*, 149 Wn.2d at 783. Because it was Mr. Reynolds' right and duty to supplement the record and he failed to do so, he has waived his right to a complete transcript. *See In re Det. of Strand*, 139 Wn. App. 904, 914-15, 162 P.3d 1195 (2007) (concluding that "[a] party who contends that the record is deficient must supplement the record through affidavits" or else the argument is waived), *aff'd*, 167 Wn.2d 180, 217 P.3d 1159 (2009); *Miller*, 40 Wn. App. at 488 (holding that a defendant waived his right to a complete record by not attempting to obtain affidavits from the trial court and counsel concerning the missing portion of the record).

Mr. Reynolds also fails to explain how the allegedly incomplete record prejudices

[5] Although Mr. Reynolds faults the transcript, it is unclear whether it is actually deficient. Because the audio CD of the wire recording has not been included in our record, we have no way of knowing whether the transcript is really incomplete as Mr. Reynolds alleges—perhaps the recording was largely inaudible when played to the jury, as the transcriptionist described. Without the CD, we cannot know whether the "inaudible" portions of the transcript are due to the transcriptionist working from a poor recording of the trial proceedings or whether the audio itself was incoherent.

him on appeal. The State points out that the audio CD of the wire recording was in evidence and could have been included in the record designated on appeal. There is no showing of what, if anything, we would have been able to discern from a complete transcript—but not the CD—that would undermine the verdict.

Mr. Reynolds has failed to demonstrate either a constitutionally defective record or prejudice.

IV

Mr. Reynolds' last challenge to proceedings at trial is that the record is insufficient to support his conviction. When charging a person with delivery of a controlled substance under RCW 69.50.401(1), the State is obliged to prove that the defendant (1) delivered a controlled substance and (2) knew the delivered substance was controlled. *State v. Martinez*, 123 Wn. App. 841, 846, 99 P.3d 418 (2004). Mr. Reynolds contests the sufficiency of the evidence to support the delivery element. Suppl. Br. of Appellant at 20-21.

A defendant's challenge to the sufficiency of the evidence requires the reviewing court to view the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably

can be drawn therefrom." *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). When conducting a substantial evidence review, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980); *State v. Epefanio*, 156 Wn. App. 378, 384, 234 P.3d 253, *review denied*, 170 Wn.2d 1011 (2010). We defer to the fact finder on witness credibility issues. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

"'Deliver' or 'delivery,' means the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship." RCW 69.50.101(f). Mr. Reynolds' argument that the evidence is insufficient to establish delivery is premised on the record he has submitted for review, limited as it may be by his failure to include the audio recording of the heroin transaction. Yet even without the audio recording, there is more than sufficient evidence in the record from which a fair-minded, rational person could conclude that a delivery of heroin from Mr. Reynolds to Mr. Fairman occurred. Mr. Fairman testified that Mr. Reynolds personally handed him the heroin in exchange for $20 in cash. This alone is sufficient evidence to support the delivery element of the crime.

V

Turning to Mr. Reynolds' challenges to his sentence, he first argues that the trial court relied on an improper basis for denying his request for an exceptional downward sentence. He claims that it impermissibly relied on facts underlying his 2005 plea agreement discussed at sentencing by the prosecutor that were not proven during trial or sentencing.

As a general rule, standard range sentences under the Sentencing Reform Act of 1981, chapter 9.94A RCW, are not appealable. RCW 9.94A.585(1); *State v. Sandefer*, 79 Wn. App. 178, 180-81, 900 P.2d 1132 (1995). The prohibition is not absolute, however, as we may review a standard range sentence in "circumstances where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Mr. Reynolds argues that the following account of facts underlying his 2005 plea agreement, presented by the prosecutor at sentencing, was improperly relied upon by the trial court:

> Mr. Reynolds has previously been—had previously been the beneficiary of an exceptional sentence reduction, an exceptional sentence downward. And that was in his last trial—or, excuse me, his last delivery charge. This was back in 2005. It was a hand-to-hand delivery, uh, with Detective Watson for, I think, about $5 worth of methamphetamine, a very small amount. And in that case the State extended a plea offer on the day of trial that allowed him to take advantage of an exceptional sentence downward.

RP (Dec. 21, 2010) at 240.

Assuming that the trial court relied on these details of Mr. Reynolds' 2005 plea agreement when imposing sentence (itself questionable), its reliance would not have been improper. A trial court may consider "no more information than is . . . admitted, acknowledged, or proved in a trial or at the time of sentencing" when imposing a standard range sentence. RCW 9.94A.530(2). Facts are considered "acknowledged" within the meaning of the statute when presented during the sentencing hearing and not objected to by the parties. *State v. Grayson*, 154 Wn.2d 333, 339, 111 P.3d 1183 (2005); *State v. Handley*, 115 Wn.2d 275, 282, 796 P.2d 1266 (1990). Mr. Reynolds never objected to the prosecutor's recitation, so the facts became acknowledged during the sentencing hearing. Assuming the trial court relied on these facts, it did not commit error by doing so.

VI

Finally, Mr. Reynolds argues that he received ineffective assistance of counsel at sentencing because his lawyer failed to request a prison-based DOSA as an alternative to a standard range sentence.

A criminal defendant has a Sixth Amendment right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must show both

deficient performance and resulting prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To show prejudice, a defendant must demonstrate that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id*. at 335. If a defendant fails to satisfy either prong, the court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). There is a strong presumption of effective assistance, and the defendant bears the burden of demonstrating the absence of a strategic reason for the challenged conduct. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." *McFarland*, 127 Wn.2d at 333.

Defense counsel's performance during the sentencing hearing was not deficient. Choosing to pursue an exceptional downward sentence of 20 months instead of a prison-based DOSA sentence, which would have entailed a total sentence of 114 months, was reasonable under the circumstances. *See State v. Breitung*, 173 Wn.2d 393, 400, 267 P.3d 1012 (2011) (recognizing that counsel's decision to pursue an "all or nothing" strategy at trial was reasonable under the circumstances). To concede that 57 months of confinement plus another 57 months of community custody was an acceptable alternative would have undermined counsel's tactical choice to argue that the small quantity of drugs involved dictated a proportionately short sentence. Mr. Reynolds' three prior VUCSA[6]

violations dating back to 1995 and his admitted relapse after completing a drug rehabilitation program called his candidacy for a DOSA sentence into question, further weighing in favor of advocating, instead, for leniency, based on the size of the transaction.

While the court could, and apparently did, consider the appropriateness of a DOSA sentence, defense counsel's refusal to pursue the alternative placed the court in the difficult position, if it did not grant an exceptional downward sentence, of having to sentence Mr. Reynolds to more than seven years' confinement for selling twenty dollars' worth of heroin. The court acknowledged as much, repeatedly stating that it was "torn" on how to sentence him. RP (Dec. 21, 2010) at 253. The fact that the strategy was ultimately unsuccessful does not demonstrate deficient performance. *State v. Grier*, 171 Wn.2d 17, 43, 246 P.3d 1260 (2011) (stating that whether a "strategy ultimately proved unsuccessful is immaterial" and that "hindsight has no place in an ineffective assistance analysis" when discussing the deficient performance prong of an ineffective assistance of counsel claim).

Even if counsel acted deficiently by not pursuing a DOSA evaluation and sentence, Mr. Reynolds fails to establish how that omission prejudiced the outcome of the sentencing proceeding. He does not argue that the sentencing court would have likely

[6] Violations of the Uniform Controlled Substances Act.

granted a DOSA sentence had it been requested; he contends only that the court would have been required to *consider* the option. This argument, while true, is insufficient to establish the prejudice necessary to assert a claim of ineffective assistance of counsel. Nothing in the record establishes that Mr. Reynolds would have been a good candidate for the program, especially given his admission during the sentencing hearing that he began using drugs again after having already completed a rehabilitation program.

STATEMENT OF ADDITIONAL GROUNDS

In a pro se statement of additional grounds (SAG), Mr. Reynolds raises a number of issues, most of which were addressed by his lawyer's supplemental brief and are addressed above. Two issues are raised only in the SAG.

Mr. Reynolds first raises a challenge to the special verdict instruction given to the jury under *State v. Bashaw*, 169 Wn.2d 133, 234 P.3d 195 (2010), *overruled by State v. Guzman Nuñez*, 174 Wn.2d 707, 285 P.3d 21 (2012). To begin with, the instruction given in this case complied with *Bashaw*, as it did not require juror unanimity to answer "no" on the special verdict form.[7] Even if the jury instructions as a whole could be

[7] The instruction states:

> Because this is a criminal case, all twelve of you must agree in order to answer "yes" on the special verdict form. In order to answer the special verdict form "yes", you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If any of you have a reasonable doubt as to this question, you must answer "no."

CP at 51 (Instruction 14).

construed to require unanimity to answer "no" to the special verdict allegation, there was no objection made to the instructions in this respect. The error would therefore not be reviewable. *State v. Guzman Nuñez*, 160 Wn. App. 150, 165, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707. Finally, in its review of *Guzman Nuñez*, the Supreme Court decided that its ruling in *Bashaw* and *State v. Goldberg*, 149 Wn.2d 888, 72 P.3d 1083 (2003) were wrong and overruled them.

Mr. Reynolds also argues that the trial court erred by admitting testimony about the results of a measuring device used to determine whether the drug sale occurred within 1,000 feet of a school bus route stop without any showing that the device was reliable at the time of use. To challenge a trial court's admission of evidence on appeal, a party must raise a timely and specific objection at trial. *State v. Gray*, 134 Wn. App. 547, 557, 138 P.3d 1123 (2006). Defense counsel raised no objection to the admission of the evidence produced by the measuring device, thereby waiving the issue on appeal. *See also State v. Ortega*, 134 Wn. App. 617, 625-26, 142 P.3d 175 (2006).

Affirmed.

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

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Siddoway, J.

WE CONCUR:

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Korsmo, C.J.

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Kulik, J.