No. 101744-8

Court of Appeals No. 56047-0-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Plaintiff / Respondent,

v.

SANDY M. CROCKER,

Defendant / Petitioner.

ON REVIEW FROM THE COURT OF APPEALS OF
THE STATE OF WASHINGTON,
DIVISION TWO,
AND
THE SUPERIOR COURT OF
THE STATE OF WASHINGTON,
CLALLAM COUNTY

PETITION FOR REVIEW

KATHRYN RUSSELL SELK, No. 23879
Counsel for Petitioner

RUSSELL SELK LAW OFFICE
1037 Northeast 65th Street,# 176
Seattle, Washington 98115
(206) 782-3353No. 10-11598

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

FEDERAL CASES

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. *IDENTITY OF PETITIONER AND DECISION BELOW*

Sandy M. Crocker, Petitioner, was the appellant below in a review of criminal convictions. She asks the Court to grant review of the umpublished decision terminating review issued by Division Two in this case, *State v. Crocker*, __ Wn. App.2d ___ (2022 WL 369761), issued January 24, 2023. A copy is attached as Appendix A.

B. *ISSUE PRESENTED FOR REVIEW*

> The Court of Appeals appears to have conflated this Court's standards for when improper opinion testimony amounts to "manifest constitutional error" with this Court's standards for when constitutional error in improper opinion testimony is "harmless" beyond a reasonable doubt. As a result, in this case that Court did not place the burden on the State, did not assume that the damage of the improper opinion was fully realized, and did not use the proper "overwhelming untainted evidence" standard.
>
> Should this Court grant review under RAP 13.4(b)(1) to address the lower appellate court's failure to use the proper standard for constitutional harmless error in the admission of improper opinion testimony on guilt?

C. *STATEMENT OF THE CASE*

The State alleged that Sandy Crocker sold methamphetamine to a confidential informant on three different days and that, when she was arrested, she had "meth" in her purse. CP 106-109. She was charged by

amended information with three counts of delivery for the alleged sales and one count of possession with intent to deliver, all alleged to have occurred within 1000 feet of a school bus route stop. CP 106-109.

The claims against Ms. Crocker stemmed from efforts of a former friend, Emily McCallister, also called "Emily Beedle." RP 232, 234, 272, 332-33. Ms. McCallister, who had a prior conviction for theft, had been taken in by Ms. Crocker when Ms. McCallister and her then-husband had been homeless, with nowhere else to go. RP 332-33, 383-84, 459. At trial, Ms. McCallister testified that she was setting up her friend to help Ms. Crocker be "better than what she's doing now." RP 379. Ms. McCallister also said she was "helping" get people off drugs and it was "not right" that drugs were on the streets. RP 379.

Eventually, however, Ms. McCallister admitted she was getting paid. RP 381. Her "handler" initially minimized it as just a few dollars for "gas" but ultimately it was confirmed to be $100 per "buy." RP 235, 272.

For count 1, the first "buy," no officer could say they had searched Ms. McCallister before she went into an apartment

where Ms. Crocker was supposed to be living with others, including a man named Sean Erickson whom Ms. McCallister said was dating Ms. Crocker. RP 241, 245, 275, 296, 382, 396-98. Ms. McCallister claimed she had gone into the apartment, given "buy" money to Mr. Erickson and been given suspected "meth" Mr. Erickson took from Ms. Crocker. RP 273-74, 338-40. Ms. Crocker testified that she had not seen Ms. McCallister that day. RP 460.

The jury was not convinced by the State's evidence on this claim and acquitted Ms. Crocker of "delivery" for this charge. CP 80-81; RP 548.

The count in question on review, the second count, was based on an alleged delivery on April 13. RP 250-52. Again, there were questions about whether Ms. McCallister was actually physically searched by any officer prior to engaging in the "controlled buy." RP 252, 288, 291-97, 382-83. This time, Ms. McCallister drove a car and picked up Ms. Crocker at the apartment complex, driving to a nearby park and waiting for awhile with Ms. Crocker, who went into and out of a store. RP 288-89, 399-400. Another car eventually pulled into the parking lot at the park and Ms. Crocker went over and talked

to someone through an open window before returning to Ms. McCallister's car. RP 256, 289-90.

Ms. McCallister then drove back to the apartment complex, where Ms. Crocker got out, went inside for a short time, then came back out. RP 256, 289-90, 297. Ms. McCallister claimed that Ms. Crocker had received drugs from a supplier in the park and gone into her apartment that day to split them up, returning to give Ms. McCallister 1.7 grams of suspected meth. RP 256-60.

Ms. Crocker remembered that day and meeting a friend at the park with Ms. McCallister but denied buying or selling drugs. RP 463-75. When they had gotten back from the park, Ms. McCallister had forgotten something in the apartment so Ms. Crocker had gone inside to get it. RP 463. There was a recording played at trial and there was discussion of getting "a couple hundred dollars' worth" and Ms. Crocker said something about "he still only gave me a ball" and dividing it at her house because "he didn't have another bag." 1RP 10.

None of the police, agents, or detectives could see inside the car that day. RP 275, 291, 297. None of them saw anything like a transaction, either. But McCallister's handler, a

narcotics enforcement team task member named Agent Daniel Janikic, repeatedly gave his opinion to jurors that what happened in the car that day was that drugs were exchanged for money. RP 254-56.

First, as the State's first witness, the officer told jurors what happened was "Ms. Crocker came out of the apartment, met the subject sorry, met the confidential informant in her vehicle to **where the transaction took place**." RP 254-55 (emphasis added). Defense counsel objected, "stating his opinion on which is ultimately for the trier of fact." RP 254. The judge ruled, "you can describe what he has personal knowledge of, because that's how I'll rule." RP 254.

A moment later, returning to what happened when Ms. Crocker came out of the apartment and got back in the car, the prosecutor asked "what happened next," and the agent testified, "**[w]hat happened then was an exchange of controlled substances took place for money.**" RP 256-57 (emphasis added). Counsel objected and the court said the officer could "testify to what he has personal knowledge of," and counsel asked for clarification but the prosecutor said "I think we can move past this point[.]" RP 256-57. The judge

then said the officer needed to limit his testimony to "things he has actual personal knowledge of not speculating as to what happened" and sustained the objection. RP 256-57.

On cross-examination, the agent admitted he did not see any transaction himself that day. RP 275. The jury convicted on this count and found the apartment complex parking lot was within 1,000 feet of a school bus route stop, also convicting for a third count which stemmed from a later "buy." CP 75-83; RP 548-49. In addition to acquitting Ms. Crocker of the first alleged "buy," jurors acquitted her of possession with intent to deliver four "small baggies" of suspected methamphetamine found in her purse, one of which tested positive for containing methamphetamine. RP 438-50; CP 108-109.

On appeal, Ms. Crocker argued that the agent's testimony was improper direct or near-direct opinion on Ms. Crocker's guilt, in violation of her Sixth Amendment and Article 1, § 21 rights to trial by jury and to have the jurors serve as the sole fact-finders at trial. Brief of Appellant ("BOA") at 18-27. She noted that the sole issue before jurors was whether a transaction had, in fact, taken place, so the officer's

testimony amounted to an improper opinion about the guilt, veracity, or credibility of the accused.

In its Response, the State conceded that the testimony was an improper opinion on Ms. Crocker's guilt, given by a law enforcement officer whose testimony "may carry [a] special aura of reliability." Brief of Respondent ("BOR") at 28. The prosecution also agreed the officer's opinion was directly relevant to the charges of delivery of a controlled substance and not a proper inference drawn from perceived facts. BOR at 28.

But the prosecution then urged the Court of Appeals to find the officer's flagrant, improper opinion on guilt to be essentially harmless because the officer ultimately admitted he had not seen a transaction, which counsel pointed out in closing, and the jurors were properly instructed. BOR at 30. The State argued that it had shown beyond a reasonable doubt that the officer's violation of Ms. Crocker's constitutional rights by giving the opinion on her guilt was "harmless," citing evidence is said showed Ms. Crocker's likely guilt based on evidence the prosecution said was "very strong[.]" BOR at 33.

The Court of Appeals, Division Two, did not determine whether the officer's declarations were improper opinion testimony. App. A at 3. Instead, the court held, "assuming without deciding" that the officer gave such an opinion, reversal was not required. App. A at 3-4. Apparently adopting the State's view of "harmlessness," the court of appeals declared that "Crocker **cannot show prejudice**," because the trial court sustained the objection while referring to the officer limiting testimony to "personal knowledge," and jurors were instructed not to consider inadmissible evidence. App. A at 3 (emphasis added). Further, Division Two's opinion declared, "the State offered overwhelming evidence of Crocker's guilt" so that "even if the former detective's statement was improper, **Crocker cannot show prejudice.**" App. A at 4 (emphasis added).

D. ARGUMENT

THIS COURT SHOULD GRANT REVIEW BECAUSE THE COURT OF APPEALS ERRED IN APPLYING THE IMPORTANT "CONSTITUTIONAL HARMLESS ERROR" STANDARD AND THE CURRENT INTERPRETATION OF ITS APPLICATION TO IMPROPER OPINION TESTIMONY IS DEEPLY FLAWED

As part of the state and federal constitutional rights to trial by jury, the accused is entitled to have the jurors serve as sole judges of the evidence, including deciding the weight and credibility to give evidence. *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Sixth Amend.; Art. 1, § 21. This Court has held that these rights are violated when a witness testifies to their opinion or belief about the guilt, veracity or credibility of the accused, or the credibility of any witness at trial. *Lane*, 125 Wn.2d at 838; *see State v. Quaale*, 182 Wn.2d 191, 199, 340 P.3d 213 (2014); *State v. Montgomery*, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005). The Court has further held that the strict "constitutional harmless error" standard applies. *State v. Kirkman*, 159 Wn.2d 918, 927, 155 P.3d 125 (2007); *see also, State v. Demery*, 144 Wn.2d 753, 760, 30 P.3d 1278 (2001).

These are not the standards that Division Two applied. It seems that there is confusion in the lower appellate courts

about application of the "constitutional harmless error" standard to the constitutional error which occurs when an officer gives an improper opinion on the guilt of the accused. This case asks the Court to grant review and reaffirm that the constitutional harmless error standard it set forth in *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986), applies. On application of that standard, the conviction for count 2 must be reversed, because the State failed to meet its heavy burden of proving the constitutional errors "harmless."

After a time in which all constitutional errors compelled relief, our nation's highest court decided that some constitutional errors might be so trivial that they could be deemed "harmless" and overlooked by a reviewing court if there is confidence the errors did not affect the verdict. *See, e.g., Chapman v. California*, 386 U.S. 18, 21, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). In *Guloy*, this Court rejected the "contribution" theory of constitutional harmless error, instead adopting the "overwhelming untainted evidence" test. 104 Wn.2d at 426. Under that test, constitutional error is *presumed* reversible on appeal and the burden shifts to the

State to prove the error "harmless" by our highest standard of "beyond a reasonable doubt." *See State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002).

The State can only meet its heavy burden of proving constitutional error "harmless" if it shows that the untainted evidence is so overwhelming "necessarily" leads to a conclusion of guilt. *See State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996). Further, on review, the appellate court assumes the damaging potential of the improper opinion testimony was "fully realized." *See State v. Moses*, 109 Wn. App. 718, 732, 119 P.3d 906 (2005), *review denied*, 157 Wn.2d. 1006 (2006).

Those are not the standards the Court of Appeals applied here. *See* App. A. Instead, Division One held Ms. Crocker to the burden, reviewed the evidence in a way favoring the State's theories, and ruled based on Ms. Crocker's "failure" to show prejudice. App. A at 3-4. More specifically, Division Two declared that "**Crocker cannot show prejudice"** because "**Crocker has presented no evidence that the jury was improperly influenced"** by the officer's improper opinion that a drug transaction occurred and showed "no evidence"

that jurors "failed to follow the court's instructions" to generally disregard improper evidence. App. A at 3 (emphasis added). Division Two also said that **"Crocker cannot show prejudice**" because the evidence supported the State's version of events by what the court of appeals said was "overwhelming evidence of Crocker's guilt." App. A at 4 (emphasis added).

Those are not the standards this Court set forth for review of these issues. Nor do they follow the requirements set forth in *Guloy*.

Instead, the lower appellate court appears to have applied a new standard which melded "sufficiency of the evidence" analysis with questions of when there is "manifest constitutional error" - neither of which were at issue here. For a "sufficiency of the evidence" claim, the review is forgiving, the burden is on the appellant and reviewing court takes the evidence in the light most favorable to the State and asks if *any* rational trier of fact *could have* found guilt, even if the reviewing court would not. *See State v. Romero*, 113 Wn. App. 779, 797, 54 P.3d 1255 (2002). For constitutional harmless error, the error is presumed prejudicial and reversal is required

unless and until the State can prove beyond a reasonable doubt that the untainted evidence is so overwhelming on guilt that *every rational* trier of fact faced with that evidence would necessarily find guilt, even without the error. *Quaale*, 182 Wn.2d at 202. That is not the standard applied here.

In addition, Division Two is conflating this Court's decisions on constitutional harmless error with decisions on whether improper opinion testimony can amount to a manifest error affecting a constitutional right and thus may be raised for the first time on appeal, without objection below. *See*, *e.g.*, *Montgomery*, 163 Wn.2d at 595; *Kirkman*, 169 Wn.2d at 921. This Court held that improper opinion testimony may not *always* be raised for the first time on appeal as "manifest constitutional error;" instead the testimony must amount to a "nearly explicit statement by the witness" on guilt, veracity, or credibility. *Kirkman*, 159 Wn.2d at 937. The Court noted that failing to object deprives the trial court of the chance to remedy or prevent any error, and that the "manifest error" standard is thus narrow. *Id*. The Court then found that, under the facts of *Kirkman*, any error was not "manifest" in part because the jury was properly instructed they were the sole

deciders of credibility. *Kirkman*, 159 Wn.2d at 934-35. This appears to be from where Division Two got its theory that even where there is objection below as to improper "opinion" by an officer and the officer testifies twice as to his belief that a drug transaction occurred in a case where that was the sole issue, there is no error if the jury is properly given the general instruction to disregard improper evidence and there is some evidence of guilt.

This Court should grant review. The Court of Appeals failed to apply the correct standards for where, as here, counsel objected below to an officer's Improper opinion testimony and the constitutional harmless error standard set forth in *Guloy* applies. In a case where the only issue was whether a drug transaction had occurred, an officer testified twice to his opinion that *a drug transaction had occurred*. He did not view the transaction; the State admitted it was just his opinion. The evidence of guilt was not overwhelming. Indeed, the jurors clearly did not believe the informant's claims completely, as evidenced by the decisions to acquit on count 1 despite the informant incriminating Ms. Crocker for that count, too. On review, this Court should apply the proper

Guloy standard and should find that the State did not meet its heavy burden of proving that every single trier of fact would necessarily have convicted Ms. Crocker even absent the error.

E. *CONCLUSION*

For the reasons stated herein, the Court should grant review.

DATED this 23rd day of February, 2023.

ESTIMATED WORD COUNT: 2,802

Respectfully submitted,

KATHRYN RUSSELL SELK, No. 23879
Counsel for Petitioner
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, PMB #176
Seattle, Washington 98115
(206) 782-3353

2023 WL 369761
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Sandy Marion CROCKER, Appellant.

No. 56047-0-II
|
Filed January 24, 2023

Appeal from Clallam Superior Court, Docket No: 20-1-00301-7, Honorable Lauren M. Erickson, Judge.

Attorneys and Law Firms

Kathryn A. Russell Selk, Russell Selk Law Office, 1037 Ne 65th St. # 176, Seattle, WA, 98115-6655, for Appellant.

Jesse Espinoza, Clallam County Deputy Prosecuting Attorn, 223 E. 4th St. Ste. 11, Port Angeles, WA, 98362-3000, for Respondent.

UNPUBLISHED OPINION

Glasgow, C.J.

***1** Sandy Crocker sold methamphetamine to a confidential informant on two occasions. At trial, a law enforcement officer stated that a transaction occurred at one of the meetings, even though he did not see the transaction. Defense counsel objected and the trial court sustained the objection. The officer admitted on cross-examination that he did not see the transaction. A jury convicted Crocker of two counts of delivery of a controlled substance.

Crocker appeals. She argues her right to a fair trial was violated by the officer's statement and we should reverse one of her convictions. The State concedes that the officer's statement was improper but argues that any error was harmless. Crocker also filed a statement of additional grounds for review (SAG).

We affirm Crocker's convictions.

FACTS

After a confidential informant performed three separate controlled buys of methamphetamine from Crocker, police arrested Crocker and found more methamphetamine in her purse at the time of her arrest. The State charged Crocker with three counts of delivery of a controlled substance and one count of possession with intent to deliver a controlled substance.

At trial, a former detective testified about the procedure for the controlled buys. He explained that officers search confidential informants and their vehicles both before and after a controlled buy and that they try to maintain constant surveillance during the operation. Informants sometimes wear wires to record their interactions with the sellers. The informant in this case was paid $100 per successful purchase of methamphetamine.

The detective testified that on the second in the series of controlled buys from Crocker, the informant wore a wire and was searched beforehand, and law enforcement found no illegal substances. The informant then went to the apartment complex where Crocker lived, seeking to purchase methamphetamine:

> [PROSECUTOR:] And did the transaction take place immediately or shortly thereafter when she got to [the apartment complex]?
>
> [DETECTIVE:] Yes. The -- Ms. Crocker came out of the apartment, ... met the confidential informant in her vehicle to [go to] where the transaction took place.
>
> [DEFENSE COUNSEL:] Objection, this is stating his opinion ... which is ultimately for the trier of fact.
>
> THE COURT: So, [I] think you can describe what he has personal knowledge of, because that's how I'll rule.

1Verbatim Rep. of Proc. (VRP) at 254. When asked if Crocker and the informant went anywhere from the apartment complex, the detective testified that the informant drove Crocker to a parking lot near a store, followed by detectives. They later returned to the apartment complex:

> [PROSECUTOR:] And what happened once they were at [the apartment complex]?

[DETECTIVE:] Once they got to [the apartment complex], Ms. Crocker got out of the vehicle, went into her apartment and a few moments later she then arrived back to the confidential informant's vehicle.

[PROSECUTOR:] And after that, what happened next?

[DETECTIVE:] What happened then was an exchange of controlled substances took place for money.

***2** [DEFENSE COUNSEL:] Objection.

THE COURT: Again, he can testify to what he has personal knowledge of.

[DETECTIVE:] So, after the –

[DEFENSE COUNSEL:] The objection is sustained because he doesn't have personal knowledge? I mean –

THE COURT: Well, --

[PROSECUTOR:] Well, I think we can move past this point and simply go onto the narrative.

THE COURT: Okay. Well, let me say this. I'm not quite sure what your objection was, but I think he needs to limit his testimony to things he has actual personal knowledge of not speculating as to what happened.

He wasn't there. Isn't that what you're objecting to?

[DEFENSE COUNSEL:] Correct. So, the State –

THE COURT: So, I guess I sustain in that sense.

1 VRP at 255-56. The trial court did not strike the detective's statement or instruct the jury further at that time. On cross-examination, the detective admitted that he had not personally observed a transaction.

The detective testified that after leaving the apartment complex, the informant returned to the designated search location, "got out of the vehicle, [and] handed [the detective] a small bag of what looked like methamphetamine." 1 VRP at 257. A lab later confirmed that the substance in the bag was methamphetamine.

Other detectives assisting with the controlled buy operation confirmed that at the parking lot near the store, Crocker walked over to the window of another vehicle, then returned to the informant's vehicle, which promptly left to return to the apartments. At the apartment complex, Crocker briefly went inside while the informant waited, then Crocker returned. Crocker "[g]ot back in the vehicle for a few moments and then walked back out and then [the] informant left" for the designated search location. 1 VRP at 290.

The informant also testified at trial. She testified that the trip to the store parking lot was so Crocker could meet her supplier to buy more methamphetamine and that she gave Crocker money to pay her supplier. Back at the apartment complex, Crocker went upstairs to weigh the methamphetamine she had purchased, then returned to the vehicle to give the informant her share.

The State also played portions of the wire recording from the second controlled buy. In the recording, Crocker and the informant discussed the price of methamphetamine, Crocker's arrangement with her supplier, and what amount of methamphetamine the informant was buying. They also discussed splitting the methamphetamine that Crocker got from her supplier.

The jury instructions told the jurors that they were "the sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." Clerk's Papers (CP) at 85. "If evidence was not admitted or was stricken from the record, then you are not to consider it in reaching your verdict." CP at 84. The jurors were instructed to avoid conscious or unconscious bias and to not draw conclusions from the lawyers' objections.

The jury acquitted Crocker of one charge for delivery of a controlled substance where there was no audio recording of the transaction, and the charge for possession with intent to deliver. The jury convicted Crocker of two counts of delivery of a controlled substance, including the second controlled buy discussed above, with special verdicts that the deliveries were within 1,000 feet of a school bus route stop.

***3** Crocker appeals.

ANALYSIS

I. OPINION TESTIMONY

Crocker argues that the detective gave improper opinion testimony about her guilt, violating her rights under article I, section 21 of the Washington Constitution and the Sixth Amendment to the

United States Constitution. The State concedes that the testimony was improper but contends that Crocker was not prejudiced.

Crocker insists the improper testimony was not harmless beyond a reasonable doubt because the only other evidence of the second controlled buy was the informant's testimony, "the drugs she turned over, and the recording." Appellant's Br. at 27. Crocker argues the informant's credibility was weak, "[t]here were questions about whether she was thoroughly searched, and she could have concealed the drugs herself. The recording could be indicating other behavior rather than drugs." Appellant's Br. at 27. Thus, Crocker argues we must reverse the conviction for the second controlled buy. We disagree.

It is inappropriate for a witness in a criminal trial to testify about "opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses." *State v. Montgomery*, 163 Wn.2d 577, 591, 183 P.3d 267 (2008). And "police officers' testimony carries an 'aura of reliability.' " *Id.* at 595 (quoting *State v. Demery*, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001) (lead opinion)). "Permitting a witness to testify as to the defendant's guilt raises a constitutional issue because it invades the province of the jury and the defendant's constitutional right to a trial by jury." *State v. Olmedo*, 112 Wn. App. 525, 533, 49 P.3d 960 (2002). A constitutional error is presumed prejudicial, and the State must show the error was harmless beyond a reasonable doubt through untainted evidence presenting "an overwhelming conclusion of guilt." *Id.*

In determining whether opinion testimony prejudiced a defendant, we consider if and how the jury was instructed, because "[p]roper instructions obviate the possibility of prejudice." *State v. Blake*, 172 Wn. App. 515, 531, 298 P.3d 769 (2012). This court has held that "opinion testimony does not constitute reversible error where the trial court properly instructs the jury ... that it is the sole judge of witness credibility and not bound by witness opinions." *State v. Curtiss*, 161 Wn. App. 673, 697, 250 P.3d 496 (2011). "Absent evidence that the jury was unfairly influenced, we presume that the jury followed the court's instructions." *Id.* at 698.

Here, assuming without deciding that the detective's statement was an opinion of Crocker's guilt, Crocker cannot show prejudice. Crocker objected and the trial court sustained the objection. When responding, the trial court referred to the requirement that the detective testify only about his personal knowledge. And the detective testified during cross-examination that he did not personally see the transaction take place. The jury was properly instructed that it was the sole judge of each witness's credibility, and "the sole judges of the value or weight to be given to the testimony of each witness." CP at 85. It was also instructed not to consider inadmissible evidence or draw conclusions from parties' objections. Crocker has presented no evidence that the jury was improperly influenced or failed to follow the court's instructions.

***4** And the State offered overwhelming evidence of Crocker's guilt. The confidential informant testified that she and Crocker went to buy methamphetamine from Crocker's supplier, then they returned to Crocker's apartment building. There, Crocker weighed and separated the informant's portion of the drugs as the informant waited in the parking lot. Other detectives also confirmed Crocker approached the window of another car in the store parking lot before returning to the informant's car. Back at the apartment complex, Crocker was also observed going inside while the confidential informant waited. Detectives confirmed Crocker returned to the car, got in for a few seconds, and got right back out again. Significantly, the jury also heard excerpts of the wire recording where the informant gave Crocker money to pay her supplier, Crocker and the informant talked about the amount of methamphetamine the informant was purchasing from Crocker, and they discussed splitting the drugs. Thus, even if the former detective's statement was improper, Crocker cannot show prejudice.

II. SAG

Crocker argues that she received ineffective assistance of counsel because she was unable to have in-person contact with her attorney due to the COVID-19 pandemic and she was unable to obtain a copy of her discovery. She also contends that no omnibus hearing occurred, constituting a due process violation.

To demonstrate ineffective assistance of counsel, a defendant must show that their attorney performed deficiently, and that the deficient performance prejudiced the defendant by depriving them of a fair trial. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011). When a defendant raises a claim of ineffective assistance on appeal, we may consider only facts within the record. *Id.* at 29. A defendant must file a personal restraint petition if they intend to rely on evidence outside the record. *Id.*

Crocker asked when the omnibus hearing was going to occur and the trial court explained that the parties had treated a previous status hearing as the omnibus hearing. Crocker then stated she had asked her attorney to provide her with her discovery, which she had "been able to look at ... twice, very briefly." 1 VRP at 76. She told the trial court that she felt impeded in her ability to assist with her own defense. The trial court then continued the trial date by two weeks to give Crocker and her attorney additional time to address any concerns.

At a status conference before the new trial date, Crocker said she wanted to represent herself. She alleged that she had "not had an opportunity to even respond to any of the allegations," and that this prejudiced her. 1 VRP at 93. Her attorney then told the trial court that Crocker had "been given every opportunity to come into our office to review the discovery." 1 VRP at 94. Crocker stated she had only been given one hour to review discovery at her attorney's office. The trial court told

Crocker she needed to discuss her issues with her attorney. Crocker did not bring any further issues with her attorney to the court's attention.

By her own admission, Crocker had several opportunities to review her discovery. And she does not show how having her own copy of the discovery would have changed the result of the trial. She also does not show how additional in-person contact with her attorney would have changed the result of her trial. Nor does she establish that the trial court failed to hold an omnibus hearing or that her due process rights were violated. Without more, these claims fail.

CONCLUSION

We affirm Crocker's convictions.

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.

We concur:

Maxa, J.

Cruser, J.

All Citations

Not Reported in Pac. Rptr., 2023 WL 369761

End of Document

RUSSELL SELK LAW OFFICE

February 23, 2023 - 3:55 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	56047-0
Appellate Court Case Title:	State of Washington, Respondent v. Sandy Marion Crocker, Appellant
Superior Court Case Number:	20-1-00301-7

The following documents have been uploaded:

- 560470_Petition_for_Review_20230223155505D2986726_0318.pdf
  This File Contains:
  Petition for Review
  The Original File Name was crocker p4r fin.pdf

A copy of the uploaded files will be sent to:

- jespinoza@co.clallam.wa.us
- jesse.espinoza@clallamcountywa.gov

Comments:

Sender Name: Kathryn Selk - Email: KARSdroit@gmail.com
Address:
1037 NE 65TH ST # 176
SEATTLE, WA, 98115-6655
Phone: 206-782-3353

Note: The Filing Id is 20230223155505D2986726