NO. 33702-2-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

MIGUEL ANGEL MAGALLAN,

Appellant.

BRIEF OF RESPONDENT

David B. Trefry WSBA #16050
Senior Deputy Prosecuting Attorney
Attorney for Respondent

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2d St. Rm. 329
Yakima, WA 98901-2621

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

Cases

TABLE OF AUTHORITIES (continued)

PAGE

Supreme Court Case

Rules

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. Mr. Magallan's conviction for possession with intent to deliver violated his federal and state constitutional right to due process.
2. The evidence was insufficient to prove the elements of possession with intent to deliver beyond a reasonable doubt.
3. The prosecution failed to prove Mr. Magallan intended to deliver a controlled substance.
4. The prosecution failed to present evidence of intent to deliver beyond the quantity of drugs and the officer's opinion.
5. The trial court failed to properly determine Mr. Magallan's criminal history and offender score.
6. The sentencing judge erred by sentencing Mr. Magallan with an offender score of nine.
7. The trial court erred by entering Finding of Fact No. 2.3 because the evidence was insufficient to establish Mr. Magallan has the criminal history listed therein. (Judgment and Sentence, CP 115)
8. The trial court erred by entering Finding of Fact No. 2.7 because the record does not support the boilerplate finding Mr. Magallan "is not disabled and therefore has the ability or likely future ability to pay the legal financial obligations imposed herein."
9. The imposition of legal financial obligations is improper because Mr. Magallan lacks the ability to pay.
10. The court erred by imposing costs of incarceration and medical care.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1-4. The evidence presented at trial was sufficient to support the charge of possession with intent to deliver as charged.

5-7. Magallan's criminal history was properly determined and the proper score was used to sentence Appellant.

8-10 While not fully addressed on the record this matter is being challenged for the first time on appeal and therefore this court may and should, declined to address this assignment of error.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in Appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to specific sections of the record as needed within the body of this brief.

III. ARGUMENT

The evidence presented was more than sufficient to support the charges against Appellant. There were only two persons who supplied substantive testimony regarding the location where the drugs were found and the packaging and content found along with the drugs. The testimony was from the arresting office, a Community Corrects Officer who had known the defendant for nine years and a Det. Horbatko, a Yakima City detective assigned to one of the local drug task forces.

Magallan stood on his right to remain silent, therefore there was no evidence other than that set forth by the State. Magallan does not challenge the second count of this information, Possession of Heroin. (CP 15-16, 108, 114)

RESPONSE TO ISSUES ONE – FIVE.
There was sufficient evidence presented to the jury for that jury to find this defendant guilty of possession with intent to deliver methamphetamine. The trial court properly denied Appellant's motion to dismiss for insufficient evidence allowing the case to go to

the jury.

Appellant challenges the sufficiency of the evidence to support his conviction for count one, Possession with Intent to Deliver Methamphetamine. In reviewing a challenge to the sufficiency of the evidence, this court will view the evidence in a light most favorable to the State to determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One form of evidence is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd,*

136 Wash.2d 939, 969 P.2d 90 (1998).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974). State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) The reviewing court need not "itself" be convinced beyond a reasonable doubt. State v. Bucknell, 183 P.3d 1078, 1080 (2008) follows this line of cases and additionally indicated "Credibility determinations are within the sole province of the jury and are not subject to review." State v. Myers, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Assessing discrepancies in trial testimony and the weighing of evidence are also within the sole province of the fact finder. State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990)."

This defendant may not be the "typical" movie set, television drama depicted drug dealer. Magallan's trial counsel tried to argue the "typical dealer ethos" was necessary for the charges to go forward. However, looking at the facts presented in conjunction with the man who was being prosecuted the State presented evidence that Magallan was not this storybook dealer but none the less he was in fact in possession of the

tools of **his** trade.

This is a man who was from all appearances homeless. (RP 107-8) His method of transportation was a bicycle and it would appear that the bag he carried may have been his home. (RP 102-3, 107-8) To expect that a homeless person who had come into a quantity of drugs with a wholesale value of approximately $600.00 and a street value at nearly $1000.00 along with the added packages and describe the only the possible use for this supply of drugs as for "personal use" is ludicrous.

The fact is that Det. Horbatko and Community Corrections Officer (CCO) McLean both stated that they had never seen this amount of methamphetamine on a person for personal use. (RP 77)

Det. Horbatko;

> Q. In your -- have you in your nine years of experience ever seen what -- what you had stated as just a pure user, with that much methamphetamine.
> A No.
> …
> "I've never seen an ounce be personal use -- in my entire career – so far." (RP 77, 90)

Officer McLean had known the defendant for nine years and during that time he had not known him to hold a job. (RP 107-8) Magallan's attorney tried to elicit testimony that her client was on some form of disability however that was never established. (RP 109)

It is true that the drug testing done on Magallan resulted in a

positive test for the metabolites of both of the drug found in his possession but the argument in the trial court seems to center on the idea that a person is either a "dealer" or a "user." Clearly a person with no legitimate income who obviously has a substance abuse problem, Magallan was on supervision for previous drug arrests, would need some method of securing the drugs he wants or needs. The large quantity help by the Appellant would allow him to be able to feed his habit and do so while generating the income needed to support his addiction through the sale of some of that same controlled substance. As the testimony Det. Horbatko indicated this was an amount that was equal to "165 to 327 doses." (RP 75) While it is clear that the defendant has a right not to testify the jury was presented with testimony that reflected a supply that would last any "user" with what would be a significant supply if that was merely for "personal use." There was nothing rebut that testimony.

To require a level of sophistication as seen in many of the cases cited by Appellant to uphold a conviction for possession with intent to deliver will negate the State's ability to prosecute a vast array of individual who are in fact selling drugs but doing not to gain vast wealth but to support and sustain an all-consuming addiction. An addiction that leaves them homeless and jobless. One would not expect an individual such as Mr. Magallan carrying around a large amount of cash or a nice

digital scale or for that matter uniform baggies and packaging with which to distribute his wares. You would expect to see what was found here, mismatched packaging and as large a quantity of controlled substance as can be purchased.

A requirement that each person who is tried by the State for this crime to have in his or her possession a wade of cash, a nice neat stash of drugs and uniform packaging ignores the reality of the world within which illegal drugs are purchased, used and sold.

The trial court described this in common terminology that minimizes the fact that while it may be that Magallan does not run a "for profit" operation he is still dealing to others with his same addiction because "…he's simply supporting his habit?" (RP 245)

The trail court stated it well when it denied the "half-time" motion by the defendant to dismiss the possession with intent to deliver methamphetamine;

> THE COURT: Well, I will -- I will observe that it's -- it is the -- a bit of a close case. But there is -- there is -- have to look at the evidence light most favorable to the non-moving party.
>
> And when I do that I look -- There's a significant amount of methamphetamine -- It's over an ounce -- testimony from Det. Horbatko that that is a -- a -- a quantity well in excess of anything that would be consistent with possession for personal use. Hundreds of - - of dosages, if you would, contained within that -- that – one ounce plus of methamphetamine.

> We have -- the materials is in three separate containers. There is a, additionally, two empty baggies that are found in the same location as the methamphetamine. And these are not like sandwich bags; these are bags that would be used, typically used for -- for the -- packaging or repackaging of -- of a controlled substance
>
> You know, close question, but it's -- it's sufficient for the case to -- to -- go to the jury.
>
> It certainly is, you know, a -- instruction on the lesser included offense of simple possession is certainly warranted. But the -- the possession with intent to deliver is -- is appropriate to -- to -- is a jury question in this particular case.
>
> (RP 171-2)

State v. King, 113 Wn. App. 243, 269, 54 P.3d 1218 (2002), "The standard of review is whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt." State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980)). This court does not substitute its judgment for that of the jury on factual issues. State v. Farmer, 116 Wn.2d 414, 425, 805 P.2d 200 (1991). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Spruell, 57 Wn. App. 383, 385, 788 P.2d 21 (1990).

The truth here is that in the world of drug users and abusers there clearly are a sub-category who are using their entrepreneurial abilities to

allow them to generate the income they need to feed their habit through the sale and distribution of drugs. Clearly not all people who possess drugs for resale are going to be found carrying a large wad of $100.00 bills, a digital scale and small uniform sized baggies.

RESPONSE TO ISSUES FIVE –SEVEN.
Appellant acknowledged that he had convictions that counted in his criminal history that dated back "24 years." The Appellant's criminal history was properly counted by the trial court.

Magallan's trial counsel acknowledged his prior criminal history at his sentencing:

> I would point out that -- we have to go back 25 years to count the criminal offenses for Mr. Magallan. 1988, for which there's not even any paper work. 1989, 1993. He knows that those count under the current Sentencing Reform Act guidelines. They didn't used to. That was a change that was made several years ago to -- make sure that any misdemeanor conviction prevented a washout instead of just felonies.
>
> But we have somebody here who has an offender score -- that he does. And technically there's seven prior felonies in the last 25 years. And then because he was on DOC that adds a point. And then because there are concurrent convictions that and that's how you get to nine.
>
> So, Mr. Magallan's position is that he really doesn't even -- His position he doesn't even really merit the bottom of the range. And that is because when we're thinking about the purposes of sentencing and the Sentencing Reform Act, under 9.94A.010, we're talking about things that need to be commensurate punishment with others committing a similar offense. Many, many of the people in Mr. Magallan's shoes that have a possession with intent to deliver actually have -- all of their crimes within maybe ten or twelve years. (RP 259)
>
> …

> ….And I would submit to the court that a top of the range sentence, or even a mid-range sentence, for a criminal history that's spread out over 25 years is not just. Certainly if Mr. Magallan had all seven points in the last, you know, ten years, that would probably be a really different story. But -- whether Mr. Magallan is in prison for 36 months plus 24 months, and we get to five years, or he's in for seven years or nine years, -- the extra two years or four years or five years or, under the state's position, you know, seven years, isn't going to promote any more respect for law enforcement, isn't going to protect the community any more, isn't going to reduce his risk of reoffending.
>
> So, we're -- we think -- Mr. Magallan's position is that this case, and the facts in this case, support, at most, -- a 60-month sentence with the mandatory school zone. (RP 260-1)

Magallan has convictions which are reflected in his judgment and sentence from 1988, 1989, 1993, 2004, 2005, 2009, 2013, and in the section below the statement if criminal history this document indicates that the present crime was committed while the defendant was on supervision, just as stated by Magallan's trial counsel. (CP 115, RP 260-1)

This is not a case where the defendant stood silent or challenged his criminal history. In this case Magallan actually used his history in an attempt to convince the trial court that the person who stood before it was a person with a very long history of addiction, including a term of treatment on one of his more recent convictions. (DOSA)

It is well settled law that "at sentencing, the State bears the burden of proving by a preponderance of the evidence the existence of prior

convictions used to determine the defendant's offender score. In re Personal Restraint of Cadwallader, 155 Wn.2d 867, 876, 123 P.3d 456 (2005). The defendant is not required to challenge prior convictions that the State presents and uses to calculate his offender score. Instead, a defendant may challenge an erroneous sentence based on a miscalculated offender score at any time. Id. at 874-75, 123 P.3d 456.

Clearly Magallan did not challenge his criminal history in then trial court and it is the State's position he actually used or attempted to use that history to mitigate his sentence. Magallan actively acknowledged his history and should not now be allowed to use that history as both a sword and a shield.

Here, as in Mendoza, infra, Mr. Magallan did not object and in fact agreed with that he had extensive and older criminal history and therefore the sentencing court had no opportunity to correct any error if one even exists. Therefore, if this court finds error it must remand with a full opportunity for the State to prove Mr. Magallan's criminal history at resentencing. State v. Mendoza, 165 Wn.2d 913, 930,205 P.3d 113 (2009) is controlling, and holds:

> When a defendant raises a specific objection at sentencing and the State fails to respond with evidence of the defendant's prior convictions, then the State is held to the record as it existed at the sentencing hearing. But where ... there is no objection at sentencing and the State

> consequently has not had an opportunity to put on its evidence, it is appropriate to allow additional evidence at sentencing. (Citation omitted.)

RESPONSE TO ISSUES EIGHT - TEN.
Imposition of legal financial obligations. This court has addressed this assignment of innumerable times and ruled in numerous ways this court has however consistently ruled that mandatory cost must be imposed. Three costs were imposed in this case all were mandatory.

The State shall not belabor this issue. The State prepared the standard judgment and sentence in this case. In that document are set forth the costs the State is requesting be imposed. In this case the State requested that the defendant pay;

> 4.D.3 Restitution…
> $ 500.00 Crime Penalty Assessment-felony or gross misd. (RCW 7.68.035)
> $ 200.00 Criminal filing fee
> $ 600.00 Court appointed attorney recoupment (RCW 9.94A.760)
> $ 100.00 DNA collection fee (any felony committed after 7/1/02) (RCW 43.43.7541)
> $ 2,000.00 Fine to the State of Washington
> $ 250.00 Drug enforcement fund-YPD (RCW 9.94A.760)
> $ 3,600.00 TOTAL (CP 117)

In subsection 4.D.3 the trial court struck out all costs that are not mandatory and retotaled the final costs assess as $800.00 not the original $3,600.00. Clearly the trial court did take into account Magallan's ability to pay.

All of the noted costs are mandatory assessments that are made without concern for the defendant's ability to pay. State v. Lundy, 176 Wn.

App. 96, 102, 308 P.3d 755 (2013) (mandatory fees, that include victim restitution, victim assessments, DNA fees, and criminal filing fees, operate without the court's discretion by legislative design); State v. Kuster, 175 Wn. App. 420, 424, 306 P.3d 1022 (2013) (victim assessment and DNA collection fee mandatory)

Thereafter follow two subsections, 4.D.4 Costs of Incarceration and 4.D.5, Costs of Medical Care. Subsection 4.D.4 indicates that the any costs associated with that item are "Capped at $100." (This is partially covered by a file stamp on this portion of the judgment and sentence in the CP's. The State has included a clean copy of his page in the appendix of this brief.)

This case mirrors State v. Stoddard, 192 Wn.App. 222, 366 P.3d 474 (Wash.App.Div. 3 2016) there is nothing in this record to support the claims that Magallan set forth. There is no indication in the written or oral record that there were any costs associated with 4.D.5. The medical costs portion of the judgment and sentence. The State can't arbitrarily come back at some later date and insert some number. If the State were to find that costs were incurred, they could not be imposed at a later date at all and the only method that they even could be addressed in the trial court would be if the State brought a motion at which time a hearing would be held and Magallan would be allowed to supply the record needed and the

trial court could ask the questions Magallan says the court failed to ask in the initial hearing.

This court should follow its previous ruling in Stoddard:

> The appellate court may refuse to review any claim of error which was not raised in the trial court.
> RAP 2.5. No procedural principle is more familiar than that a constitutional right, or a right of any other sort, may be forfeited in criminal cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *Yakus v. United States*, 321 U.S. 414, 444, 64 S.Ct. 660, 88 L.Ed. 834 (1944).
>
> Good sense lies behind the requirement that arguments be first asserted at trial. The prerequisite affords the trial court an opportunity to rule correctly on a matter before it can be presented on appeal.
>
> …
>
> We consider whether the record on appeal is sufficient to review Gary Stoddard's constitutional arguments. Stoddard's contentions assume his poverty. Nevertheless, the record contains no information, other than Stoddard's statutory indigence for purposes of hiring an attorney, that he lacks funds to pay a $100 fee. The cost of a criminal charge's defense exponentially exceeds $100. Therefore, one may be able to afford payment of $100, but not afford defense counsel. Stoddard has presented no evidence of his assets, income, or debts.
>
> Thus, the record lacks the details important in resolving Stoddard's due process argument.
>
> Gary Stoddard underscores that other mandatory fees must be paid first and interest will accrue on the $100 DNA collection fee. This emphasis helps Stoddard little, since we still lack evidence of his income and assets.

If this court determines that action must be taken regarding the "capped" amount set out in subsection 4.D.4, the State would ask that the

court simply order that that section of the judgment and sentence be struck. The cost associated with having an inmate transported from prison to the county facility, having an attorney appointed, setting a hearing, which in all probability will have to be several hearings so that all parties have the information needed to address this cost far and away exceeds the $100.00 that the court imposed as a cost, a cost that there is very little chance the State will ever collect.

IV. CONCLUSION

For the reasons set forth above this court should deny this appeal. .

Respectfully submitted this 1st day of August 2016,

By: s/ David B. Trefry
DAVID B. TREFRY WSBA# 16050
Senior Deputy Prosecuting Attorney
P.O. Box 4846 Spokane, WA 99220
Telephone: 1-509-534-3505
Fax: 1-509-534-3505
E-mail: David.Trefry@co.yakima.wa.us

APPENDIX A

☒ Residence location and living arrangements are subject to the prior approval of the Department of Corrections while in community custody.

☒ Allow home visits by the Department of Corrections to monitor compliance with supervision. Home visits must include access for the purposes of visual inspection of all areas of the residence in which the defendant lives or has exclusive or joint control or access.

☒ Not own, use, or possess, including constructively, any firearm or ammunition.

☒ Maintain law-abiding behavior and commit no new crimes.

☒ If the defendant is or becomes subject to court-ordered mental health or chemical dependency treatment, the defendant must notify the Department of Corrections, and the defendant's treatment information must be shared with the Department of Corrections for the duration of the defendant's incarceration and supervision. RCW 9.94A.562.

☒ Report for urinalysis as ordered by the Department of Corrections.

☐ Other: _____

D. FINANCIAL OBLIGATIONS

4.D.1 Financial: The defendant shall pay financial obligations and abide by the conditions as set forth below. The defendant shall be under the jurisdiction and supervision of this Court for purposes of payment of financial obligations ordered until they are paid. The defendant shall report to the Yakima County Clerk, Yakima County Courthouse, Room 323, 128 North Second Street, Yakima, WA, within 24 hours of this order or release from incarceration, whichever is later. The defendant must notify the Yakima County Clerk's Office of changes in address or employment. During the period of repayment, the county clerk may require the offender to report to the clerk for the purpose of reviewing the appropriateness of the collection schedule for the legal financial obligation. During this reporting, the offender is required under oath to respond truthfully and honestly to all questions concerning earning capabilities and the location and nature of all property or financial assets. The offender shall bring all documents requested by the county clerk in order to prepare the collection schedule. RCW 9.94A.760(7)(b).

4.D.2 Jurisdiction: All legal financial obligations for an offense committed on or after July 1, 2000, may be enforced at any time the offender remains under the court's jurisdiction. For an offense committed on or after July 1, 2000, the court shall retain jurisdiction over the offender, for purposes of the offender's compliance with payment of the legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. The clerk of the court is authorized to collect unpaid financial obligations at any time the offender remains under the jurisdiction of the court for purposes of his or her financial obligations. RCW 9.94A.753(4) and RCW 9.94A.760(4).

4.D.3 Restitution, Costs, Assessments, and Fine: Defendant shall pay the following to the Yakima County Superior Court Clerk, Room 323, Yakima County Courthouse, Yakima, WA 98901:

PCV	$	**500.00**	Crime Penalty Assessment – felony or gross misd. (RCW 7.68.035)
FRC	$	**200.00**	Criminal filing fee
PUB	$	~~**600.00**~~	Court appointed attorney recoupment (RCW 9.94A.760)
DNA	$	**100.00**	DNA collection fee (any felony committed after 7/1/02) (RCW 43.43.7541)
FCM/MTH	$	~~**2,000.00**~~	Fine to the State of Washington
	$	~~**250.00**~~	Drug enforcement fund – YPD (RCW 9.94A.760)
	$	~~**3,650.00**~~ 800	**TOTAL**

4.D.4 Costs of Incarceration: In addition to the above costs, the court finds that the defendant has the means to pay for the costs of incarceration, in prison at a rate of $50.00 per day of incarceration or in the Yakima County Jail at the actual rate of incarceration but not to exceed $100.00 per day of incarceration (the rate in 2015 is up to $87.95 per day), and orders the defendant to pay such costs at the statutory rate as assessed by the Clerk. Such costs are payable only after restitution costs, assessments and fines listed above are paid. RCW 9.94A.760(2).

capped at $100

JOSEPH A. BRUSIC
Yakima County Prosecuting Attorney
128 N. 2nd Street, Room 329
Yakima, Washington 98901
(509) 574-1210 Fax (509) 574-1211

DECLARATION OF SERVICE

I, David B. Trefry, state that on August 1, 2016, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Mrs. Susan Gasch at gaschlaw@msn.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 1st day of August Spokane, Washington.

s/ David B. Trefry
DAVID B. TREFRY, WSBA #16050
Deputy Prosecuting Attorney
Yakima County, Washington
P.O. Box 4846, Spokane WA 99220
Telephone: (509) 534-3505
Fax: (509) 534-3505
David.Trefry@co.wa.yakima.us