42844-0-II

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

State of Washington
Appellant

v.

TAWANA LEA DAVIS
Respondent

42844-0

On Appeal from the Kitsap County Superior Court

Cause No. 11-1-00248-7

The Honorable Sally F. Olsen

APPELLANT'S BRIEF

Jordan B. McCabe, WSBA # 27211
For Appellant, Tawana L. Davis

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II. ASSIGNMENTS OF ERROR & ISSUES

A. Assignments of Error.

1. Appellant was convicted of multiple controlled substance offenses on insufficient evidence in violation of the Sixth Amendment and Article I, Section 22 of the Washington Constitution.

2. Appellant was convicted on evidence obtained in violation of the Fourth Amendment and Wash. Const. art. 1, § 7 when her dwelling was searched pursuant to a warrant issued without probable cause.

3. Appellant received ineffective assistance of counsel in violation of the Sixth Amendment and Article I, Section 22 of the Washington Constitution.

4. The trial court denied Appellant's right to confrontation and to present a complete defense, in violation of the Sixth Amendment and Wash. Const. Art. 1, § 22.

5. The trial court abused its discretion by admitting inadmissible hearsay that encompassed incriminating 3rd degree hearsay attributed to Appellant.

6. The evidence was insufficient to prove Appellant made her dwelling available for an unlawful purpose.

7. The evidence was insufficient to establish multiple school zone enhancements.

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B. Issues Pertaining to Assignments of Error.

1. Can a conviction for delivery of a controlled substance rest upon an alleged "controlled" buy by manifestly unreliable informants where the location precludes police surveillance and provides numerous alternative opportunities to obtain drugs and hide buy money?

2. Can a fatally defective "controlled" buy establish probable cause for a search warrant?

3. Did Appellant receive ineffective assistance where her counsel (a) failed to challenge the invalid search warrant, and (b) failed to challenge the erroneous application of the school zone enhancement statute?

4. Do the rights to confrontation and to present a complete defense encompass evidence of the motives and opportunities of the State's witnesses to lie?

5. In a prosecution for delivery of a controlled substance, does the court commit reversible error by permitting a witness to testify to an out-of-court statement made to the witness by a declarant who said the defendant had made an out-of-court statement to her that she had drugs to sell?

6. Was the evidence obtained in the defective buys insufficient to prove the offense of delivering a substance in lieu of a controlled substance?[1]

[1] It is unlawful, ... for any person to offer, arrange, or negotiate for the sale, gift, delivery, dispensing, distribution, or administration of a controlled substance to any person and then sell, give, deliver, dispense, distribute, or administer to that person any other liquid, substance, or material in lieu of such controlled substance. RCW 69.50.4012(1).

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7. Is RCW 69.50.010(1),[2] which criminalizes making premises available for drug activity, unconstitutional as applied to these facts?

8. Under RCW 69.50.435(1),[3] the school zone enhancement statute:

(a) Does the 1,000 feet distance from a school bus stop in subsection (c) refer to a radius on an aerial image or a linear measurement on the ground?

(b) Does the penalty in subsection (d) for an offense within 1,000 feet of "the school" refer to the school served by the bus stop in (c), rather than to "a school" referred to in RCW 69.50.435(1)(a)?

(c) If the statute is ambiguous, does the Rule of Lenity require an interpretation favorably to the accused?

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[2]It is unlawful for any person who has under his or her management or control any building, room, space, or enclosure, either as an owner, lessee, agent, employee, or mortgagee, to knowingly rent, lease, or make available for use, with or without compensation, the building, room, space, or enclosure for the purpose of unlawfully manufacturing, delivering, selling, storing, or giving away any controlled substance ... . RCW 69.53.010(1).

[3] (1) Any person who violates RCW 69.50.401 ...(a) In a school; (b) On a school bus; (c) Within one thousand feet of a school bus route stop designated by the school district; [or] (d) Within one thousand feet of the perimeter of the school grounds; ... may be punished by a fine of up to twice the fine otherwise authorized by this chapter, ...or by imprisonment of up to twice the imprisonment otherwise authorized by this chapter[.] RCW 69.50.435(1).

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III. SUMMARY OF THE CASE:

Appellant, Tawana Lea Davis, appeals her convictions for several drug-related convictions all of which ultimately rest upon evidence obtained in a series of fatally defective "controlled" buys. She challenges the sufficiency of the evidence, both as substantive evidence of delivery and as probable cause for a search warrant obtained by the police to search Ms. Davis's dwelling.

IV. STATEMENT OF THE CASE

In late 2010, and early 2011, Tawana Davis was living at the Chieftain Motel in Bremerton, where she was employed. The room rent was deducted from her pay. RP 194.[4] The Chieftain was a notorious drug dealing site in a drug-infested area. RP 232.

The Bremerton drug enforcement team recruited two confidential informants, Laura Sutton and Robert White, to do controlled buys of meth from Ms. Davis. Both were methamphetamine addicts who were familiar with and accepted by the Chieftain Motel drug community. RP 30, 47, 51.

Laura Sutton was a meth addict and dealer who had just been "busted" with an offender score of 10. RP 30. She was facing serious time and made a deal with the Bremerton police for the standard "three-for

[4] The verbatim report of proceedings is in five consecutively paginated volumes.

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free" informant contract, whereby drug addicts facing incarceration name three suppliers and conduct multiple buys with each. in exchange for a recommendation of leniency. Tawana Davis was one of Sutton's three names. RP 313. Sutton was a frequent visitor to the Chieftain and was acquainted with Tawana Davis. RP 350.

Robert White was also a meth addict. His incentive to work for Musselwhite was to obtain a favorable recommendation for his girlfriend who was facing drug charges. RP 47, 51.

Detective Musselwhite describes the routine at RP 146-49. The officers would meet with a CI in a relatively private spot near the motel where they would search the CI's body and vehicle and give them a quantity of recorded bills. The CI would then drive to the Chieftain, park, and go inside.

Unfortunately, the Chieftain was so situated that police could not conduct any meaningful surveillance. Musselwhite had to view the proceedings from a position on a nearby hill. RP 178. The police could not approach the motel, because everyone knew each other there. RP 179. The best surveillance Musselwhite could achieve was to overlook the motel grounds from the top of a nearby hill. RP 179. He could some of the front facing rooms and a slice of the front office, but no part of the

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parking lot. RP 218, 281-82. The CI handlers could not see the doors of any other rooms, however.

Accordingly, once a CI left the parking lot and entered the motel, the handlers had no way to monitor where in the motel the CI went or what he or she did while in there. RP 179, 282. All the police could do was wait.

The CIs would eventually emerge from the motel and drive to a rendezvous site where the officers would again search them and their vehicles.

Evidence that the target individual had engaged in the agreed buy, or had even been contacted, consisted solely of the CIs' uncorroborated word and the fact that they returned with drugs and no money.

Laura Sutton claimed to have done two controlled buys with Davis, one on November 16, and a second on December 3, 2010, in Room 108, which Davis then occupied. RP 164, 326.

Robert White claimed to have done a buy from Davis on December 30, 2010, in the Chieftain parking lot. On January 14, 2011, White alleged to have done a second buy, this one in Davis's new room, No. 102.

The police obtained a search warrant for Room 102. CP 261. They found some meth residue, a couple of scales, some packaging

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material, and assorted personal paraphernalia. RP 83. The record contains no return of service or inventory.

Davis was charged with three counts of delivering, one count of possession, and one count of making premises available, all within 1,000 feet of a school bus stop and a school, in violation of RCW 69.50.401(1), RCW 69.53.010(1) and RCW 69.50.435(1)(c) & (d). CP 26-31. The State later added a couple of bail jumping charges for pretrial failures to appear, and a witness tampering charge. CP 43-49.

Davis was convicted by jury. CP 92-94. The jury also returned guilty verdicts on six school zone enhancements. CP 95-98. She appeals.[5]

V. ARGUMENT

1. THE SO-CALLED "CONTROLLED" BUYS WERE FATALLY DEFECTIVE.

First, the protocol employed in these buys was inherently unreliable.

The "control" in a "controlled buy" must be sufficient to provide some degree of corroboration of an inherently untruthful informant's allegations. Specifically, it is not sufficient merely to search the informant before and after the buy. The police must also observe the informant's

[5] Additional cites to the record are included with the issues.

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entrance and exit to the buy location. *State v. Maddox*, 116 Wn. App. 796, 803, 67 P.3d 1135 (2003), *aff'd*, 152 Wn.2d 499, 98 P.3d 1199 (2004).

If done correctly, a 'controlled buy' can establish probable cause for a warrant. *State v. Casto*, 39 Wn. App. 229, 234, 692 P.2d 890 (1984). But where, as here, a controlled buy is offered in support of probable cause to search a suspect's residence, the circumstances must eliminate the possibility that the CI obtained evidence of criminal activity from a source other than the defendant or in a place other than the defendant's dwelling. The "control" must provide some degree of corroboration of the informant's allegations. In addition to searching the CI before and after the buy, the police must at minimum observe the informant actually enter and leave the buy location. *Maddox*, 116 Wn. App. at 803.

Thus, at minimum, a 'controlled buy' requires that officers actually observe the informant enter and exit the door of the residence. Otherwise, the police simply have no idea what happened. That is the case here.[6]

Each CI entered a motel and immediately disappeared from view. Some time later, the CI reappeared with drugs and without the buy money. The Chieftain was a notorious drug location.

Musselwhite himself testified that a controlled buy involves constant close surveillance of the CI from multiple viewpoints during the

[6] The prosecutor conceded there was no surveillance, but told the jury the before and after searches were enough. RP 672-73.

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buys. RP 149, 162. Yet these informants were completely out of sight for the duration of these buys. The buys essentially took place in a black box. Second, Musselwhite testified that he does not use any informant who has committed a rules violation that creates a "major reliability problem," "because they're no longer reliable as far as we're concerned." RP 160. Especially if they lie about something that pertains to the integrity of the evidence, "because so much relies on the fact that this evidence that I'm obtaining and this information that I'm using as evidence has to be relied upon." RP 161.

Again, this did not happen here. Information about the alleged buys came solely from Sutton and White. RP 653. But they were inherently unreliable.

Sutton violated the contract from the start. The State conceded that she showed up for the first alleged Davis buy with methamphetamine and paraphernalia in her purse and car and lied about them. RP 32, 34, 171, 452. She continued using drugs and dealing in the company of Davis between alleged controlled buys. RP 43.[7] Another resident of the

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[7] Court: Now, did you just say that the informant purchased from the defendant other than the setup controlled buys? Prosecutor: Yes....[T]here was one instance between the controlled buys ... [when] she and her husband went to the defendant's motel room at the Chieftain and they purchased drugs from her and used them in the room. RP 43-44. The prosecutor argued to the jury that this was evidence of Sutton's reliability. RP 676.

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Chieftain, her best friend, Ivy, was supplying her with drugs during the relevant time. RP 120, 313-14. The State conceded this was true. RP 44-45. And Sutton was arrested the day after the second alleged Davis buy for selling to a CI. RP 33. By trial time, she was serving a sentence of 100 months and had again been promised a recommendation for leniency in exchange for her testimony. RP 31.

Ms. Sutton, in addition to numerous prior drug-related felony convictions, had two forgery convictions, an identity theft conviction, and a few misdemeanor theft convictions. RP 169. In other words, she was known to be a meth-addicted liar, cheat and thief. In addition, she agreed to cooperate with Musselwhite because she was facing a 100-month sentence on drug charges. RP 28, 167. During an offer of proof before trial, Sutton admitted to what should have been disqualifying rules violations. She was dealing drugs during the entire period encompassed by the alleged Davis buys. RP 113. Her friend, Barbara Ivy, lived at the Chieftain and was getting drugs for her. RP 113-14. Sutton both bought and sold from Ivy during the Davis buy period. RP 115, 116.

Sutton even admitted having bought drugs from Barbara Ivy at the Chieftain motel before she went to Davis's room to do the buy. RP 113-14. She told a defense investigator she did drugs with Ivy at the Chieftain later that night. RP 40.

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Robert White's buys were even more compromised. As with Sutton, Musselwhite was able to see White only as he approached and left the motel. CP 266. White returned from the first buy with a bag of something that looked nothing like methamphetamine. It was the wrong color and the wrong consistency. RP 211. White claimed not to have noticed, and Musselwhite believed him because this was not an uncommon turn of events in Musselwhite's controlled buys. RP 212, 216.

After he reported with "bunk" on the first buy, White was wired with a video camera for the second buy. RP 218. Although it was checked and was working fine immediately before the buy, the device mysteriously malfunctioned at the critical moment when White got out of his car. RP 266. As with the substitution of "bunk," this did not arouse the suspicion of Musselwhite and company, because it happened all the time. RP 222-23. Rather than suspecting that the word was out around the Chieftain that Musselwhite and Plumb would believe anything, they simply rationalized that CIs are inattentive when nervous and that cameras are sensitive and unreliable. RP 215, 482-83.

After the second buy, White showed up with a barely half the quantity he had been given buy money for. Meth was found in the back seat of his car, and eventually White admitted he had stolen the drugs. CP

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267; RP 220, 227. The meth White turned over was 0.8 grams. On the back seat was 0.6 grams of large shards, not a sprinkling of dust. RP 464.

The best friend and regular meth supplier of informant Sutton lived at the Chieftain. Sutton admitted visiting this person during the "controlled" buys. Since she was out of Musselwhite's sight the entire time she was inside the motel, the possibility cannot be eliminated beyond reasonable doubt that Sutton gave the recorded bills to her friend and obtained meth from her.

Like Sutton, White was familiar with the Chieftain Motel. He was a regular drug customer there. RP 392. His girlfriend used to live there. RP 395. Like Sutton, his movements inside the motel were unrestricted and unmonitored. RP 398, 401.

Because of the fatal procedural defects, evidence obtained in the course of the supposedly controlled buys was insufficient as a matter of law as substantive evidence that Davis delivered anything to anybody.

The Court should reverse her convictions.

2. THE WARRANT TO SEARCH DAVIS'S ROOM LACKED PROBABLE CAUSE.

Reviewability. This Court generally does not consider arguments raised for the first time on appeal. RAP 2.5(a). A party may, however, appeal a manifest error affecting a constitutional right, even if the issue

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was not raised before the trial court. RAP 2.5(a)(3). Where the appellant identifies a constitutional error and shows that it had practical and identifiable consequences in the proceeding, this showing of actual prejudice makes the error manifest and allows appellate review. *State v. Roberts*, 142 Wn.2d 471, 500, 14 P.3d 713 (2000); *State v. McDonald*, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

Here, searching Davis's room on the authority of the warrant issued here was a clear constitutional error. And the fact that the police used evidence found in the room to convict Davis constitutes practical and identifiable consequence of an illegal search.

No warrant may issue except upon probable cause. Wash. Const. art. 1, § 7; U.S. Const. amend. IV; *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999), citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995). "Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched." *Thein*, 138 Wn.2d at 140, citing *State v. Dalton*, 73 Wn. App. 132, 136, 868 P.2d 873 (1994). The reviewing court gives great deference to a magistrates' probable cause determinations. *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994).

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In Washington,[8] when a search warrant is based on information from a criminal informant, probable cause sufficient to satisfy the Fourth Amendment is established only if the facts and circumstances satisfy the two-prong *Aguilar-Spinelli* test requiring that the informant's basis of knowledge and reliability be established. *State v. Vickers*, 148 Wn.2d 91, 112, 59 P.3d 58, 68-69 (2002); *State v. Bauer*, 98 Wn. App. 870, 874-75, 991 P.2d 668, 671 (2000).

The warrant affidavit included two pages of general habits of drug dealers, which are completely irrelevant. *Thein*, 138 Wn.2d at 140. CP 263-64. The affidavit also describes the two buys by Sutton in Room 108, and discusses drug paraphernalia she claimed to have seen there. CP 268; RP 366. The alleged buy by White on December 30, 2010, in the motel parking lot is also discussed. CP 268.

But probable cause to search Room 102 could only have been based on the second buy by Robert White on January 14, 2012. CP 265; RP 215. Before that, Davis occupied a different room. RP 218.

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[8] The federal courts have replaced the *Aguilar-Spinelli* test with a totality of the circumstances approach for determining when an informant's tip may establish probable cause. *Illinois v. Gates*, 462 U.S. 213, 231-32, 103 S. Ct. 2317, 76 L. Ed. 2d 527, 530 (1983). Article 1, Section 7 of the Washington Constitution, however, requires adherence to the two-prong *Aguilar-Spinelli* test. *Vickers*, 148 Wn.2d at 111-12, citing *State v. Jackson*, 102 Wn.2d 432, 440, 688 P.2d 136 (1984).

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Accordingly, probable cause required the magistrate to determine either White's inherent credibility or his reliability on the particular occasion. *Jackson*, 102 Wn.2d at 435. Musselwhite's affidavit can reasonably be said to establish White's basis of knowledge regarding drug activity at the Chieftain Motel. White's reliability with respect to activity involving Ms. Davis on January 14, 2012, however, is a different story.

The Chieftain was notorious as a close-knit community of drug users and traffickers. RP 232. Controlled buys were ongoing in multiple rooms on the day this warrant was executed. RP 230-231. Therefore, without observing White enter and leave Davis's room, Musselwhite had no knowledge whatsoever of White's activities.

Accordingly, the affidavit could not possibly contain sufficient evidence that White even encountered Davis or that any buy occurred. Had the warrant been challenged, the court would have suppressed the evidence.

The Error Was Not Harmless. When the fruits of an unlawful search are improperly admitted, this Court applies a harmless error analysis to determine whether reversal is required. *State v. Smith*, 165 Wn. App. 296, 316, 266 P.3d 250 (2011), citing *State v. Guloy*, 104 Wn.2d 412, 425-26, 705 P.2d 1182 (1985). The Court deems a constitutional error harmless only if it is convinced beyond a reasonable doubt that any

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reasonable jury would have reached the same result in the absence of the error. *Guloy*, 104 Wn.2d at 425-26. That is, that the untainted evidence must be so overwhelming that it necessarily leads to a finding of guilt. *Id.*

Here, without the evidence obtained pursuant to the invalid warrant, there was no corroboration for the testimony of the two informants. It is highly likely that the physical evidence affected the verdict of at least one of the jurors.

The sole remedy is to reverse.

3. FAILING TO CHALLENGE THE SEARCH WARRANT WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant who claims ineffective assistance of counsel has the burden to show that (1) counsel's conduct fell below an objective standard of reasonableness and (2) but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Defendants are entitled to relief under the Sixth Amendment when trial counsel fails to assert rights that may have altered the outcome, such as by failing to seek suppression. *Lafler v. Cooper*, ___ U.S. ___, 132 S. Ct. 1376, 1381, 182 L. Ed. 2d 398 (2012), citing *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (attorney's failure

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to timely move to suppress evidence during trial could be grounds for federal habeas relief.)

There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). In order to rebut that presumption, Davis must show that no legitimate trial strategy was served by counsel's conduct. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). It is per se deficient performance to neglect to bring a dispositive motion that likely would have been granted. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Rainey*, 107 Wn. App. 129, 136, 28 P.3d 10 (2001); *State v. Meckelson*, 133 Wn. App. 431, 135 P.3d 991 (2006).

Failing to challenge an invalid search warrant is ineffective under this standard. *State v. G.M.V.*, 135 Wn. App. 366, 372, 144 P.3d 358 (2006), *review denied, sub nom State v. Vargas*, 160 Wn.2d 1024, 163 P.3d 794 (2007). Moreover, here, given what counsel knew about these informants and the Bremerton controlled buy procedures, not inquiring into bona fides of the warrant cannot be rationalized as strategy. Counsel would have succeeded had he challenged the validity of the warrant to search her home. If defense counsel had investigated the search warrant affidavit, he would not only have been able to challenge the sufficiency of

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White's information on its face, but likely would have requested a *Franks*[9] hearing to investigate what appear to be material omissions in Musselwhite's affidavit.

A material misrepresentation or omission made with reckless disregard for the truth may invalidate a search warrant. *State v. Garrison*, 118 Wn.2d 870, 872, 827 P.2d 1388 (1992). If the affidavit omits information that is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. *Franks*, 438 U.S. at 155-56; *State v. Jackson*, 111 Wn. App. 660, 677, 46 P.3d 257 (2002).

Here, Detective Musselwhite misrepresented or neglected to mention information material to Robert White's credibility. The affidavit describes White as "credible and reliable." CP 268. It does not mention that he had been a meth addict for several years. RP 390. Or that he regularly bought meth at the Chieftain Motel. RP 392. Or that his girlfriend used to live at the Chieftain and the couple regularly did drugs with Davis. RP 395. The affidavit says that Davis made statements that led White to speculate that the granular imitation substance delivered in the parking lot (RP 212) had been weighed and packaged in Room 102. CP 268. The record contains no evidence of any such statement. to the

[9] *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

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contrary, the record establishes that Davis was not yet living in 102. White himself testified that Davis was living in a third floor room on that date. RP 398.

The Chieftain was "pretty much where all the deals were happening in that year[.]" RP 404. Bremerton police officer Steven Polonsky testified that he had personally participated in a dozen buys. RP 514. Controlled buys were ongoing in multiple rooms on the day this warrant was executed. RP 230-231. This information was omitted from the warrant affidavit. Had it been included, the magistrate likely would have been less willing to accept at face value the testimony of an addict with several current contacts at the Chieftain as to which room he visited while out of sight.

Counsel's deficient performance prejudiced Davis. Physical evidence obtained from Davis's room, while arguably insufficient to support a distribution conviction standing alone, may have overcome the reluctance of at least one juror to believe the otherwise uncorroborated claims of Sutton and White.

The remedy is to reverse.

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4. THE COURT ERRONEOUSLY EXCLUDED CRUCIAL BIAS EVIDENCE.

Defense counsel wanted the jurors to know all about informants Sutton and White so they could evaluate their proclivity for lying, their motives for deception both during the alleged transactions and at trial, and their opportunity to fabricate evidence against Davis. RP 30. The court ruled the defense evidence was collateral and that its probative value was outweighed by its prejudice to the prosecution. This was error.

The Sixth Amendment confrontation clause guarantees a defendant the opportunity to confront the witnesses against him through cross-examination. *State v. Fisher*, 165 Wn.2d 727, 752, 202 P.3d 937, 946 (2009); *Delaware v. Van Arsdall*, 475 U.S. 673, 678, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986). The Washington constitution also guarantees defendants the right to confront and cross-examine adverse witnesses. Wash. Const. art. I, § 22; *State v. McDaniel*, 83 Wn. App. 179, 185, 920 P.2d 1218 (1996). It is fundamental that a person accused of committing a crime should be given great latitude in cross examining the prosecution's witnesses regarding matters relevant to motive and credibility. *State v Wilder*, 4 Wn. App. 850, 854, 486 P.2d 319 (1971). Accordingly, questions designed to uncover witness bias should be permitted provided the inquiry is supported by a good faith basis. 5A KARL B. TEGLAND,

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WASHINGTON PRACTICE — EVIDENCE LAW AND PRACTICE 6907, 5th ed (2007), at 396.

The trial court has discretion to determine the scope of cross-examination. *State v. Dixon*, 159 Wn.2d 65, 75, 147 P.3d 991 (2006). And the court's bias rulings are reviewed for manifest abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). That discretion is abused and this Court will reverse, however, if the court bases its decision on untenable or unreasonable grounds. *Dixon*, 159 Wn.2d at 75-76.

The sole tenable reason to limit a criminal defendant's right to confront the witnesses against her with bias evidence is that the evidence is repetitive and not even marginally minimally relevant. *State v. Hudlow*, 99 Wn.2d 1, 16, 659 P.2d 514 (1983). The court may not limit defense counsel's inquiry into alleged bias based except to prevent harassment, prejudice, or confusion of the issues. *Fisher* at 752; *Van Arsdall*, at 679. The more essential the witness is to the prosecution's case, the greater is the defendant's latitude to explore fundamental elements such as motive, bias and credibility. *Darden*, 145 Wn.2d at 619. Specifically, the State's witnesses' motive, bias, and credibility are fundamental elements of the defense. *Darden*, 145 Wn.2d at 619.

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The defense wanted to demonstrate the inherent unreliability of Sutton's evidence. Specifically, that she was dealing drugs during the entire period encompassed by the alleged Davis buys. RP 113. That her best friend, Barbara Ivy, lived at the Chieftain and was getting drugs for her. RP 113-14. That Sutton both bought and sold from Ivy during the Davis buy period. RP 115, 116. That Sutton bought drugs from Ivy at the Chieftain motel before going to Davis's room. RP 113-14. And that she did drugs with Ivy at the Chieftain later that night. RP 40.

The court was persuaded that this was "collateral." RP 40-41. Since Sutton's drug activity at the Chieftain before and after the alleged buy did not involve Davis, the court deemed it irrelevant and overly prejudicial to the State. RP 41. Sutton and her husband visited Davis's motel room during the buy period, bought drugs from her and used with her there. RP 350. The Court nevertheless excluded this evidence, accepting the State's argument that it was collateral and that other impeachment evidence was available. RP 41, 44.

The court acknowledged that Sutton's motivation to lie was relevant, but limited bias evidence to the fact she was facing a long sentence, with no details. RP 31. The court noted that the jury would learn about the methamphetamine in her car on direct, but ruled that the defense could not cross examine Sutton about the implications. RP 32, 36.

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The court ruled that the fact Sutton was arrested again for dealing the day after the second buy also was deemed irrelevant, because selling methamphetamine is not a crime of dishonesty. RP 39.

Robert White was prone to steal drugs during controlled buys. RP 47. He did it in the Davis buy on January 14, 2011, that served as probable cause for the search warrant and lied about it right up until trial time. RP 47-48. The defense wanted the jury to know that White did the same thing again in a subsequent investigation. RP 47. Again, the court ruled that the subsequent incident was collateral because it did not involve Ms. Davis. RP 50.

This evidence was anything but collateral. The fact that Sutton's best friend lived at the motel and was selling her drugs plus the fact that her handlers had no way to know where inside the motel she went does not merely cast doubt on her veracity. It completely blows apart any possibility of proving beyond a reasonable doubt that she bought drugs from Davis. It renders the evidence insufficient as a matter of law. The fact that White was flagrantly scamming the system was also relevant evidence of bias that was important for Davis's jury to know.

Davis had the right to challenge the credibility and reliability of these witnesses by cross examining them about their cavalier attitude toward their agreement with the police, their motive to lie and their

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incentive and opportunity to manufacture evidence with which to satisfy Musselwhite.

The erroneous exclusion of bias evidence is presumed prejudicial unless the State can meet the constitutional harmless error standard. *State v Spencer*, 111 Wn. App. 401, 408, 45 P.3d 209 (2002). Reversal is required unless the State can prove beyond a reasonable doubt that error did not prejudice the defendant and that she would have been convicted even if there had been no error. *State v Fitzsimmons*, 93 Wn.2d 436, 452, 610 P.2d 893 (1980) *overruled on other grounds by City of Spokane v Kruger*, 116 Wn.2d 135, 803 2Pd 305 (1991); *State v Johnson*, 90 Wn. App. 54, 69, 950 P.2d 981 (1998).

The Court should reverse Davis's convictions.

5. THE COURT ERRONEOUSLY ADMITTED PREJUDICIAL HEARSAY.

The defense objected to Detective Musselwhite's testifying to what Sutton said to him after supposedly setting up a buy with Davis. RP 166. The court overruled, on the ground that hearsay was admissible to show a police officer's state of mind. RP 190. Musselwhite then testified that Sutton told him she telephoned Davis and asked if she had any meth to sell and that Davis said she did. RP 166. This was highly prejudicial and is reversible error.

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Statements offered to illuminate the thought processes of the police do not fall into any admissible category of hearsay. The subjective motivations of the police are not in controversy and are therefore not relevant. ER 401; *State v. Edwards*, 131 Wn. App. 611, 614, 128 P.3d 631 (2006). Moreover, if the court admits a statement to show the officer's state of mind, the statement cannot be considered as substantive evidence supporting the truth of the matter asserted. *State v. Iverson*, 126 Wn. App. 329, 336-37, 108 P.3d 799 (2005). Accordingly, when such evidence is admitted, the court must give the jury a limiting instruction. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001) (when the court admits out-of-court statements for context, the jury should receive a limiting instruction, explaining that the out-of-court statement is not to be considered as evidence.)

Here, what Sutton told Musselwhite was not admissible under any hearsay exception, and moreover was entirely irrelevant. All the jury needed to know was that Musselwhite instructed Sutton to make an unsupervised call on her own phone to set up a buy. The fact that Davis allegedly said she had drugs to sell is highly incriminating and would certainly have been received by the jury as substantive evidence of guilt absent a limiting instruction.

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Arguably, counsel should have requested a limiting instruction (please see Issue 3 regarding ineffective assistance). But equally arguably, counsel's objection to the inadmissible hearsay should have alerted the court to instruct the jury not to regard it for the truth of the matter asserted. Moreover, the court limited the State to only a couple of questions about these statements. RP 190. But either the evidence was admissible, or it was not. If it was, there was no reason to limit the State's use of it. The court's having done so shows that the judge perceived that the evidence was problematic.

This error resulted in the jury hearing, from the mouth of a police officer, highly unreliable evidence that the defendant had essentially confessed to the criminal activity with which she was charged.

Reversal is required.

6. THE EVIDENCE WAS INSUFFICIENT TO PROVE DAVIS DELIVERED A SUBSTANCE IN LIEU OF METHAMPHETAMINE.

In reviewing a challenge to the sufficiency of the evidence the Court views the evidence in the light most favorable to the State and decides 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

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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).

The State charged Davis with violating RCW 69.50.4012(2) by delivering a package of "bunk"[10] that Mr. White attempted to pass off as methamphetamine after an alleged controlled buy from Davis on December 30, 2010. Count III, CP 29.

The evidence consisted of uncorroborated statements by Robert White and testimony from Officer Musselwhite that he believed White. This was insufficient to support a conviction even without the bias evidence the court erroneously excluded.

It was undisputed that White could not resist trying to steal drug evidence obtained in his controlled buys. RP 47. He did it in the Davis buy on January 14, 2011, (cited as probable cause for the search warrant) by hiding almost half of the drugs under a jacket in the back seat of his car. RP 47-48. The court erroneously kept from the jury the fact that White tried to steal the drugs in an unrelated transaction by hiding meth in his mouth. RP 47.

It was undisputed here that White was familiar with the Chieftain Motel. He was a regular drug customer there. RP 392. His girlfriend used to live there. RP 395. Moreover, on December 30, 2010, he enjoyed

[10] An unidentified non-controlled substance.

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free rein to run around the motel with a fist-full of Musselwhite's money, unobserved by his handlers. RP 398, 401.

He claimed to have looked for Davis on December 30 on the third floor where she used to live. RP 200, 398. He also said he wandered all over the motel to look for Davis cleaning a room. RP 401. Finally, White presented his handlers with the package of "bunk." No actual meth was never found.

Musselwhite spotted immediately that the color and consistency of the powder was fake. RP 215. He nevertheless testified to his belief that White had failed to notice and had honestly accepted an ersatz substance from Davis by mistake. RP 212.

But this is speculation and vouching, not evidence. It is highly inappropriate in a criminal trial for a witness to express an opinion of personal belief regarding the veracity of a witness. *Demery*, 144 Wn.2d at 761-62. In particular, opinions regarding veracity expressed by police officers unduly influence juries and deny the defendant of a fair and impartial trial. *State v. Dolan*, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003).

Moreover, White's story is highly improbable and Musselwhite's trusting acceptance of it was unreasonable. Given what we know about Mr. White, it is at least equally likely that, while out of sight of his

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oblivious handlers, he took the opportunity to hide the buy money and retrieve a previously-stashed package of bunk, or gave the money to a confederate for real meth to be delivered alter.

As a matter of law, the evidence on Count III was insufficient to convict Davis beyond a reasonable doubt of having any contact whatsoever with White on December 30, 2010. Accordingly, the Court should reverse and dismiss with prejudice. As a matter of law, insufficient evidence requires dismissal with prejudice. *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993); *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998).

7. THE UNLAWFUL USE OF A BUILDING STATUTE IS UNCONSTITUTIONALLY VAGUE AS APPLIED TO MS. DAVIS.

A statute is void for vagueness if it either (1) does not define the offense with sufficient definiteness such that ordinary people can understand what conduct is prohibited, or (2) does not contain adequate standards to protect against arbitrary enforcement. *Spokane v. Douglass*, 115 Wn.2d 171, 178, 795 P.2d 693 (1990). Due process does not permit the State to prosecute people under criminal statutes "that contain no standards and allow police officers, judge, and jury to subjectively decide what conduct the statute proscribes or what conduct will comply with a

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statute in any given case." *State v. Maciolek*, 101 Wn.2d 259, 267, 676 P.2d 996 (1984). That is what we have here.

RCW 69.53.010(1) provides that, to convict a person for unlawful use of a building for drug purposes, the State must prove beyond a reasonable doubt that "as an owner, lessee, agent, employee, or mortgagee" of a building, room, space, or enclosure, the defendant knowingly rented, leased, or made available for use the building, room, space, or enclosure for drug purposes."

Davis is not accused of renting or leasing her room. Therefore, the question is what the legislature meant by the term "made available." Since, in this context, the term carries legal implications, whether or not the condition has been established is a question of law. *Miebach v. Colasurdo*, 35 Wn. App. 803, 814, 670 P.2d 276 (1983).

Stringing three criminal acts together — rented, leased or made available for use — suggests that the Legislature viewed all three in the same context with a third party beneficiary of the unlawful conduct. That is, the premises must be rented, leased, or made available to another person.

Otherwise, the statute is unconstitutionally vague as applied. If the legislature intended to increase the penalty for a drug offense committed in the defendant's own room whenever another person is present, the

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constitution requires this to be set forth clearly enough for an ordinary person to be able to understand what constitutes the offense. *Douglass*, 115 Wn.2d at 178.

Here, even if admissible evidence established that Davis engaged in unlawful activity in her room, this cannot be characterized as making the room available. In enacting RCW 69.53.010(1), it is not reasonable to suppose that the Legislature intended to increase the penalty for drug offenses committed in the privacy of a defendant's own room rather than elsewhere.

At minimum, if the Court deems this penal statute ambiguous, the rule of lenity requires the construction that favors the defendant, absent legislative intent to the contrary. *State v. Jacobs*, 154 Wn.2d 596, 601, 115 P.3d 281 (2005).

Accordingly, the Court should reverse this conviction.

8. THE EVIDENCE WAS INSUFFICIENT TO PROVE A SCHOOL ZONE ENHANCEMENT.

The second amended information charges Davis with every conceivable violation of RCW 69.50.435, the protected zone statute. CP 44-46. To the jury, however, the prosecutor alleged solely that the offenses occurred within a 1,000-foot radius of a school bus stop or a school. RP 637, 638.

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School Bus Stop. Accepting the truth of the State's evidence and all reasonable inferences, the closest school bus stop to the Chieftain is at Forest Drive & Kitsap Way, and serves Mountain View Middle School. RP 523. The stop is within a 1,000-foot radius of the center-point of the Chieftain. RP 432- 434.

This is insufficient evidence to establish the elements of a school bus stop violation under RCW.69.50.435(1)(c).

First, the statute does not say within a 1,000 foot radius. It says within one thousand feet. RCW 69.50.435(1)(c). A 1,000-foot radius on an aerial image is not the standard, and a distance measured as the crow flies is immaterial. Crows are not subject to the statute, and people, including Ms. Davis, would traverse the distance on the ground.

Therefore, the relevant distance is that measured on the ground. That is, an investigator pushing a measuring wheel or wearing a pedometer walks the shortest route between the crime scene and the nearest protected zone. Only if the linear distance is less than 1,000 feet, will the school zone enhancement be established.

Officer Musselwhite was unable to employ a measuring wheel between the motel to the school bus stop because of the terrain. RP 639. There was no direct route to a bus stop from Room 102 at the Chieftain. The route traversed thick brush, tall fences, a steep drop, a high wall and

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the Blockbuster Video store.[11] RP 266. But Musselwhite did use his measuring wheel to locate West Sound Technical Skills Center. RP 265. This shows that he knew what the true measure was and attempted to obtain it.

School. The only school within the 1,000 foot radius is not Mountain View Middle School but the West Sound Technical Skills Center. RP 435. The State alleged that this satisfied the elements of RCW 69.50.435(1)(d). It does not. The statute does not say within 1,000 feet of a school. It says of the school. RCW 69.50.435(1)(d).

This Court interprets statutes de novo as a question of law. *State v. J.P.*, 149 Wn.2d 444, 449, 69 P.3d 318 (2003). In interpreting a statute, this court looks first to its plain language. If the plain language of the statute is unambiguous, then the court's inquiry ends and "the statute is to be enforced in accordance with its plain meaning." *State v. Armendariz*, 160 Wn.2d 106, 110, 156 P.3d 201 (2007). Criminal statutes, moreover, must receive a strictly literal interpretation. *State v. Wilson*, 125 Wn.2d 212, 216-17, 883 P.2d 320 (1994). And a court may not change the language of a clear statute, "even if it believes the legislature intended something else but failed to express it adequately." *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997). The court's role is to interpret the

[11] According to Mapquest, the distance by road is 0.3 miles, which is 528 yards, or 1,584 feet.

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law as it is written, not as it could or should have been written. *State v. Jackson*, 137 Wn.2d 712, 725, 976 P.2d 1229 (1999).

If a provision of a criminal statute is subject to more than one reasonable interpretation, it is ambiguous. *Jacobs*, 154 Wn.2d at 600-01. When a penal statute is ambiguous, absent legislative intent to the contrary, the rule of lenity mandates the interpretation that favors the defendant. *Jacobs*, 154 Wn.2d. at 601.

Specifically, here, the legislature's use of the word "the" rather than "a" in RCW 69.50.435(1)(d) is presumed to be knowing and intelligent and to signal legislative intent. The distinction between "the" and "a" is thus critical to judicial interpretation of a statute. *See, e.g., State v. Roberts*, 142 Wn.2d 471, 513, 14 P.3d 713 (2000) ("a" crime versus "the" crime in the context of accomplice liability.) Here, "the school" in subsection (d) must refer to a specific school, otherwise, it would say "a" school. The only question is which school?

Under the "last antecedent rule," qualifying words and phrases refer to the last antecedent unless a contrary intention appears in the statute. *State v. Wentz*, 149 Wn.2d 342, 351, 68 P.3d 282 (2003). Here, the last antecedent is in subsection (c). RCW 69.50.435(1) lists alternative protected zones (a) – (j). Zones (c) and (d) are (c): within 1,000 feet of "a school bus route stop designated by the school district," and (d): within

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one thousand feet of the perimeter of the school grounds. RCW 69.50.435(1) (c) & (d).

Accordingly, under the rules of logic and syntax, as well as judicial canons of statutory interpretation, "the school" referred to in (d) is the school served by the school bus in (c). Here, that would be Mountain View Middle School. But the State did not allege that Mountain View was within 1,000 feet of the Chieftain. The State claimed that the Technical Skills Center was within 1,000 feet, but this is not "the school" subject to RCW 69.50.435(1)(d).

At best, the statute is ambiguous and the rule of lenity requires the that the sentencing enhancements be vacated.

VI. CONCLUSION

For the foregoing reasons, the Court should reverse Ms. Davis's convictions, vacate the judgment and sentence, and dismiss the prosecution with prejudice.

Respectfully submitted, this 30th day of May, 2012,

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