70806-6

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No. 70806-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALAN NORD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR WHATCOM COUNTY

APPELLANT'S REPLY BRIEF

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A. ARUGMENT

1. In violation of the defendant's constitutional right to confrontation and the rules of evidence, the court admitted testimonial hearsay of an absent government informant.

A detective testified that he had an informant call Nord and that he listened in on the conversation. Over Nord's hearsay objection, the detective recounted that Cave, the informant, told Nord he wanted to buy a quarter ounce of methamphetamine. RP 181-83. For the reasons stated in the opening brief and outlined below, admission of this testimonial hearsay is reversible error that may be raised for the first time on appeal.

a. The statements were hearsay.

While admission of hearsay is reviewed for abuse of discretion, whether or not a statement was hearsay is reviewed de novo. State v. Hudlow, __ Wn. App. __, 331 P.3d 90, 97 (2014). "A statement is not hearsay if it is used only to show the effect on the listener, without regard to the truth of the statement." State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (emphasis added). Here, the informant's out-of-court statements were offered to prove the truth of the matter asserted, i.e., that the informant wanted to meet to buy a quarter ounce of methamphetamine. See id. at 614-15; State v. Johnson, 61 Wn. App. 539, 546-47, 811 P.2d 687 (1991). It was not used solely for a non-hearsay purpose.

This Court's recent decision in Hudlow,[1] a case involving similar facts and issues, is instructive. There, a confidential informant and the defendant agreed to meet in a parking lot to conduct a drug transaction. Hudlow, 331 P.3d at 92. The informant, while in a police car and in the presence of a police officer, called Hudlow. Id. at 93. At trial, this police officer was permitted to recount that the informant made arrangements to buy methamphetamine. Id. at 93-94. Relying in part on Edwards and Johnson, this Court held the informant's statements to the defendant were hearsay. Id. at 96-97.

The State contends that the statements were not offered for the truth of the matter asserted, i.e., Cave wanted to buy a quarter ounce of methamphetamine from Nord. Br. of Resp't at 10. Rather, the statements were offered to provide "context." Br. of Resp't at 10. For this reason, the State argues Johnson and Edwards are distinguishable. Br. of Resp't at 14. In support of this argument, which was not made below, the State cites non-binding opinions from the federal courts. Br. of Resp't at 10; State v. Copeland, 130 Wn.2d 244, 258-59, 922 P.2d 1304 (1996) (federal caselaw interpreting a federal rule, including the rules of evidence, is not

[1] Hudlow was decided and published after Nord submitted his opening brief. Though published in mid July 2014, well before the State submitted its response, the State does not cite or discuss Hudlow.

binding on Washington courts even if the rule is identical). This Court in Edwards rejected a similar "context" argument. See, e.g., Edwards, 131 Wn. App. at 614-15. If accepted, this run-around of the prohibition on hearsay would go a long way to eliminating the constitutional right of defendants to confront their accusers.

Moreover, unlike the federal cases, the record establishes that the statements were used for the truth of the matter asserted. See United States v. Van Sach, 458 F.3d 694, 701–02 (7th Cir. 2006) (emphasizing that "the court gave the jury a limiting instruction, explaining that the CI's statements were only to provide context for the defendant's admissions"). Here, over Nord's objection, the State used the informant's statements to obtain an accomplice liability instruction. RP 262-64; CP 34, 38. The State also argued during closing that Nord set up a drug deal over the phone with the informant. RP 274-77. Further, the prosecutor drew the jury's attention to the amount of methamphetamine requested by the informant, a quarter ounce, and the amount the informant obtained, also a quarter ounce. RP 280. Thus, there is no doubt that the statements were admitted to prove the truth of the matter asserted. United States v. Cromer, 389 F.3d 662, 678 n.10 (6th Cir. 2004) (prosecutor's closing argument resolved any potential doubt on whether statements were offered for the truth of the matter asserted).

The one Washington opinion cited by the State on the issue, Chambers, does not support its argument. State v. Chambers, 134 Wn. App. 853, 142 P.3d 668 (2006). Chambers did not involve an informant. There, the defendant's associate bought drugs from a police officer. Id. at 855-56. The State offered the associate's assertion that he had "the money" and his inquiry into the price of the drugs. Id. This Court held that these statements were not hearsay because the statements were offered to prove that a dialogue occurred between the associate and police officer about buying drugs, not about money or the price of the drugs. Id. at 859.

This Court should reject the State's contentions and hold the informant's statements were hearsay.

b. The statements were testimonial.

Testimonial statements include statements that a declarant would reasonably expect to be used prosecutorially and statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Crawford v. Washington, 541 U.S. 36, 51-52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). On whether an informant's statements to a defendant during a controlled buy qualifies as testimonial under these definitions, this Court in Hudlow answered affirmatively:

> Under the circumstances of a controlled buy, a reasonable confidential informant would believe his or her statement would further police investigations towards future criminal prosecutions and specifically that such statements "would be available for use at a later trial."

Hudlow, 331 P.3d at (quoting Chambers, 134 Wn. App. at 861). Following Hudlow, this Court should likewise hold the statements here were testimonial.

c. Admission of this testimonial hearsay is manifest constitutional error that may be raised for the first time on appeal.

"Constitutional errors are treated specially because they often result in serious injustice to the accused." State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). Thus, under RAP 2.5(a)(3), manifest error affecting a constitutional right may be raised for the first time on appeal. This includes the right to confrontation. State v. Kronich, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007), overruled on other grounds by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012).

Notwithstanding these well-established rules, the State argues that the confrontation issue is waived because counsel did not object on that basis. Br. of Resp't at 16-17. In two published cases, this Court has stated that under controlling United States Supreme Court precedent, a failure to assert the confrontation right at or before trial results in the right being forfeited. State v. O'Cain, 169 Wn. App. 228, 248, 279 P.3d 926 (2012);

State v. Fraser, 170 Wn. App. 13, 25, 282 P.3d 152 (2012). This rule lacks sound legal justification and should not be applied here.

O'Cain premised this holding on the United States Supreme Court decision in Melendez-Diaz, which recognizes States may adopt procedural rules governing confrontation clause objections:

> The right to confrontation may, of course, be waived, including by failure to object to the offending evidence; and States may adopt procedural rules governing the exercise of such objections.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). O'Cain reasons that an appellate court violates United States Supreme Court precedent by allowing a Sixth Amendment confrontation clause challenge for the first time on appeal and that Kronich was overruled in this respect. O'Cain, 169 Wn. App. at 248.

This Court in Fraser adhered to O'Cain, but acknowledged that RAP 2.5(a)(3) is arguably a procedural rule by which Washington State allows defendants to raise confrontation clause objections for the first time on appeal if they can show a manifest error. Fraser, 170 Wn. App. at 26-27. O'Cain notwithstanding, Fraser went on to analyze the issue under RAP 2.5(a)(3) and determined that the claim of error there was not "manifest." Id. at 27-29.

As this Court recognized in Fraser, RAP 2.5(a)(3) is procedural rule that governs whether a Washington appellate court may hear confrontation issues for the first time on appeal. O'Cain's conclusion that appellate courts may not hear confrontation issues for the time on appeal is wrong. Melendez-Diaz simply acknowledges that confrontation clause issues can be waived and that States may create procedural rules to govern the issue of waiver. The court did not hold that appellate courts were forbidden from hearing confrontation clause challenges for the first time on appeal. If the court did, federal courts missed the message because they continue to hear unpreserved confrontation clause challenges for the first time on appeal under "plain error" review. See e.g., United States v. Charles, 722 F.3d 1319, 1322 (11th Cir. 2013). Federal courts have also reversed convictions for confrontation clause violations under plain error analysis before. See, e.g., Cromer, 389 F.3d at 662 (admission of testimonial statements from informant plain error justifying reversal).

Any doubt on the matter is resolved by the United States Supreme Court's opinion in Michigan v. Bryant, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). There, the court reviewed a confrontation clause error that had not been preserved in a Michigan trial court. The Michigan Supreme Court addressed the issue for the first time on appeal under a "plain error" standard and held the defendant's right of confrontation was violated.

Bryant, 131 S. Ct. at 1143. The United States Supreme Court reversed, not because the state court had addressed an unpreserved confrontation clause issue, but because the statements at issue were not testimonial. Id. at 1150.

The Washington Supreme Court has also implicitly refuted the analysis in O'Cain. For example, in State v. Beadle, the court analyzed a confrontation issue under RAP 2.5(a)(3) where the defendant did not object. State v. Beadle, 173 Wn.2d 97, 105 n.8, 265 P.3d 863 (2011). In another case, the Supreme Court cited to Kronich to explain that a confrontation clause error can be raised for the first time on appeal under RAP 2.5(a)(3) in criminal cases. In re Disciplinary Proceeding Against Sanai, 177 Wn.2d 743, 762, 302 P.3d 864 (2013) ("A confrontation clause error can be raised for the first time on appeal in a criminal case under the manifest error rule because the confrontation clause is a constitutional protection that clearly applies at the trial of a criminal defendant.").

O'Cain is also inconsistent with this Court's more recent decision in Hudlow. There, this Court held it would consider a confrontation challenge even if defendant had not objected "because of the constitutional nature of the assignment and the rule that manifest constitutional error may be asserted for the first time on appeal." Hudlow, 331 P.3d at 95 (citing RAP 2.5(a)(3); State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255

(2001)). The opinion further stated that this Court "would hold that any failure to object to be ineffective assistance of counsel." Hudlow, 331 P.3d at 95.

Even assuming that Melendez-Diaz precludes Sixth Amendment confrontation clause challenges for the first time on appeal, the ruling does not apply to the state constitutional right to confrontation under article 1, section 22. Under RAP 2.5(a), manifest constitutional errors may be raised for the first time on appeal. These constitutional errors include errors under the Washington constitution.

This Court may properly review the issue as one of manifest error affecting a constitutional right under RAP 2.5(a)(3). Here, Nord shows manifest constitutional error because the error had practical and identifiable consequences. See State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). As outlined, the State used this evidence to obtain an accomplice liability instruction. The State also repeatedly used the statements during closing argument. Further, the evidence was used to establish that Nord knew the substance delivered were methamphetamine.

d. The error was prejudicial.

"A constitutional error is harmless if the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the

error." State v. Hudlow, 331 P.3d at 99. For the same reason the error is manifest, the error cannot be held harmless.

The State's accomplice liability theory on the delivery was made possible only through the informant's inadmissible statements. The State obtained an accomplice liability instruction based on the statements. RP 262-64; CP 34, 38. The State relied on accomplice liability during closing argument. RP 277. The State does not respond to this argument, implicitly conceding the point. Further, the State relied on the statements to establish that the amount delivered to Cave was the same amount Cave asked for. This allowed the jury to infer the substance came from Nord. For these reasons, the error was not harmless beyond a reasonable doubt.

The error was also not harmless for the same reason in Hudlow. There, the jury was instructed that it had to find that Hudlow knew he delivered methamphetamine. Hudlow, 331 P.3d at 99. Accordingly, under the law of the case doctrine, the State assumed the burden of proving that Hudlow knew the delivered substance was methamphetamine. Id. This Court held that this meant the error was harmful because the only evidence adequate to show knowledge was the informant's statements. Id. at 100; see also State v. Ong, 88 Wn. App. 572, 577-78, 945 P.2d 749 (1997).

Likewise, the jury in this case was also instructed that Nord had to know that the substance delivered was methamphetamine:

> To convict the defendant of the crime of Delivery of a Controlled Substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about the 10th day of April, 2013, the defendant or his accomplice delivered a controlled substance;
>
> (2) That the defendant knew that the substance delivered was a controlled substance, methamphetamine;
>
> and
>
> (3) That the acts occurred in the State of Washington.

CP 34. Here, the detective's testimony recounting that Cave wanted to buy methamphetamine from Nord was the only evidence tending to prove Nord's knowledge that the substance was methamphetamine. Thus, the error was not harmless. Hudlow, 331 P.3d at 100.

For these reasons, the error was prejudicial. This Court should reverse Nord's drug convictions for violation of the rules of evidence and his constitutional right to confront witnesses.

2. Because the charging document alleging attempting to elude a pursuing police vehicle omitted the essential element of "willfully" and this element cannot be fairly implied, the conviction should be reversed.

The State properly concedes that "willfully" is an essential element of the crime of attempt to elude. Br. of Resp't at 28. This Court should

reject the State's argument that the missing element can be fairly implied because the information alleged that Nord drove "while attempting to elude." Accusing one of attempting to elude a pursuing police vehicle does not fairly imply the element of willfulness. It does not tell an ordinary person that he or she must have known the pursuing vehicle was a police vehicle. The pursuing vehicle may, in fact, be a police vehicle, but a person could lack this knowledge and may only be "attempting to elude" a vehicle. Thus, the attempt to elude would not qualify as willful because the person lacked the requisite knowledge. State v. Flora, 160 Wn. App. 549, 555, 249 P.3d 188 (2011). The willfully language is necessary to convey this requirement of knowledge to an ordinary person. Without it, an ordinary person would not understand that the State must prove that the defendant knew the pursuing vehicle was a police vehicle.

This analysis is consistent with caselaw. For example, our Supreme Court reversed a conviction for the crime of escape because the information failed to allege that the defendant acted with the essential element of knowledge. State v. Brown, 169 Wn.2d 195, 198, 234 P.3d 212 (2010). The court held the element could not be fairly implied despite alleging that the defendant had escaped. Id. at 214. Similarly, this Court reversed convictions for hit and run because the information failed to allege the defendant knew he was in an accident and no language fairly

conveyed the essential element of knowledge. State v. Courneya, 132 Wn. App. 346, 352, 131 P.3d 343 (2006); State v. Sutherland, 104 Wn. App. 122, 130-33, 15 P.3d 1051 (2001).

Contrary to the State's argument, Nord need not show prejudice if the element cannot be fairly implied. State v. Naillieux, 158 Wn. App. 630, 643, 241 P.3d 1280 (2010). Because the willfully element cannot be fairly implied, this Court should reverse the eluding conviction.

3. The failure to give the requested unwitting possession instruction requires reversal of the possession conviction.

Failure to give an unwitting possession instruction when the evidence is sufficient to support one is reversible error. See State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). The State contends that such error may harmless, Br. of Resp't at 31, but the case cited in support of that proposition did not involve the failure to give an appropriate affirmative defense instruction and did not hold an instructional error harmless. State v. Mills, 154 Wn.2d 1, 15, 109 P.3d 415 (2005) (erroneous to-convict instruction not harmless).

In evaluating whether an unwitting possession instruction is warranted, the evidence is viewed in the light most favorable to the defendant. Otis, 151 Wn. App. at 578. Here, this standard was satisfied. The drugs were found on the floor of the car, the car may not have been

owned by Nord, and two other adults were in the car. The drugs might have unknowingly been in the car or they might have belonged to the other two persons.

The State's analysis fails to apply the standard that the evidence is interpreted in the light most favorably to the defendant. Br. of Resp't at 32-33. The State also mistakenly implies that Nord had to testify or call a witness to obtain the instruction. When deciding whether to give an instruction, a trial court must consider all of the evidence presented, regardless of which party presented it. State v. Olinger, 130 Wn. App. 22, 26, 121 P.3d 724 (2005).

The facts of Buford are not analogous. There, the evidence was inadequate to support an unwitting possession instruction. State v. Buford, 93 Wn. App. 149, 153, 967 P.2d 548 (1998). The only supporting evidence to support the instruction was that the amount of cocaine in the defendant's pipe was small. Id.

Because the evidence was sufficient to support an unwitting possession instruction, the trial court erred in failing to give the requested instruction. The possession conviction should be reversed.

4. Remaining Issues

Concerning the prosecutorial misconduct and double jeopardy issues, Nord rests on the arguments presented in the opening brief. Nord

notes, however, that in the State's response to the double jeopardy argument, the State mistakenly asserts that cocaine was found in the car. Br. of Resp't at 40-41. There was no evidence of cocaine.

Concerning resentencing, this Court should accept the State's concession that remand for resentencing on the delivery conviction is proper if the eluding conviction is reversed.

B. CONCLUSION

The drug convictions should be reversed for violation of Nord's constitutional right to confront witnesses and the rules of evidence. The eluding conviction should be reversed because the information was defective. The possession conviction should be reversed for failure to give an unwitting possession instruction.

DATED this 1st day of October, 2014.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 70806-6-I
	)	
ALAN NORD,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 1ST DAY OF OCTOBER, 2014, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 1ST DAY OF OCTOBER, 2014.

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