70806-6

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No. 70806-6

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent,

v.

ALAN NORD, Appellant.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington State Court of Appeals

Washington State Supreme Court

Federal Authority

Rules and Statutes

A. ASSIGNMENTS OF ERROR

None.

B. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether the trial court abused its discretion in admitting the informant's statements on the telephone to the defendant as non-hearsay where the statements provided context to the defendant's admissions in agreeing to deliver drugs to the informant.

2. Whether the defendant may raise a Confrontation Clause challenge on appeal where he did not raise it below.

3. Whether admission of the informant's statements violated the Confrontation Clause where the statements were not the type of testimonial statement the Clause is aimed at prohibiting and where they were not offered to prove the truth of the matter asserted but to provide context to the defendant's admissions in setting up the drug deal.

4. Whether under the liberal post-verdict standard of review, the element of "willfully" may be fairly implied from the rest of the language in the information that alleged the defendant failed to immediately stop after being signaled to do so and while attempting to elude an officer.

5. Whether the trial court abused its discretion in denying an unwitting possession instruction where no evidence was presented that the defendant did not know the drugs were in the car and where the drugs were found under the floorboard on the driver's side of the car, along with the defendant's wallet and cellphone.

6. Whether the prosecutor's remarks in closing regarding why the jury should find the defendant guilty of assaulting the officer, taken in context, caused an incurable prejudice where the prosecutor reminded the jury not to base their verdict on emotions, but on the evidence, and where the jury did not find the defendant guilty of Assault in the Third Degree.

7. Whether the entry of convictions for both possession of methamphetamine and delivery of methamphetamine violate double jeopardy where the State based the possession charge on the drugs that were found in the car at the end of the pursuit and the delivery charge on the drugs that were delivered to the informant before the pursuit.

8. Whether resentencing is required if the Court were to reverse and dismiss without prejudice the attempting to elude conviction.

C. FACTS

1. Procedural facts

On April 15, 2013 Appellant Alan Nord was charged by information with one count of Unlawful Delivery of a Controlled Substance , To-Wit Methamphetamine, in violation of RCW 69.50.401(2)(B), a class B Felony; one count of Unlawful Possession of a Controlled Substance, To-Wit: Methamphetamine, in violation of RCW 69.50.4013(1), a class C felony; Attempting to Elude a Pursuing Police Vehicle, in violation of RCW 46.61.024, a class C felony; and Assault in the Third Degree, in violation of RCW 9A.36.031(1)(A) and (G), a class C felony, for his acts on or about April 10, 2013. CP 4-6, 9-11, 13-15.[1] Nord was also charged with the aggravator under RCW 9.94A.533(11) that during the course of the eluding, he endangered one or more persons.

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[1] The information was amended twice.

Nord went to trial on the charges and was found guilty of all counts except Assault in the Third Degree. CP 57-58. The jury also found that during the commission of the eluding, he endangered one or more persons. CP 59. At sentencing, on an offender score of 16, Nord faced a standard range of 60-120 months on the delivery count, 12-24 months on the possession count and 34-41 months on the eluding count. CP 71, RP 340. The court imposed the high end of the standard range on all counts. CP 72; RP 344-45.

2. Substantive Facts

On April 10, 2013 the special investigations unit of the Bellingham Police Department decided to try to have an informant, Mr. Cave[2], do a controlled buy with Nord, and then arrest Nord, who had a warrant out for his arrest. RP 35, 37, 150-52, 180. Det. Medlen was present when the informant called Nord at the number (360) 599-5605 to set up the drug deal. RP 181. Medlen put his ear to the phone so he could hear what the person on the other end of the line was saying. Medlen recognized the voice on the other end as Nord's. RP 182. The informant talked with Nord

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[2] Cave was working off some drug charges. He had had some prescription medication, Xanax, that wasn't his and what he thought was MDMA, though it turned out that it wasn't actually MDMA. While no charges had been filed against Cave, he had to give substantial, credible information on several persons to work off the potential charges, and he had participated in several, larger drug investigations. Law enforcement had attempted to locate Cave, but he apparently had left the state. RP 195-97, 208. While Cave's contract called for him to testify, the detective believed that Cave had not appeared because he was afraid to testify. RP 207-10.

about purchasing a quarter ounce of methamphetamine. RP 182. The informant told Nord he wanted to "hook up with him," meaning he wanted to meet for the exchange and Nord told the informant that he was in Skagit County picking up product and wouldn't be back in Bellingham for a few hours. RP 183. After a few more phone calls, the informant and Nord agreed on a location, at the informant's house on Harrison near 30th Street, despite law enforcement's desire for a more public location. RP 183.

The informant's residence was a small A frame structure with basically one big room, sparsely furnished. RP 184, 190, 212. Medlen searched the informant and his vehicle before he gave the informant $260 in pre-recorded buy money. RP 184. While surveillance was set up by other units, Medlen followed the informant to the informant's residence, watched him enter the house and then continued to watch the residence from the street. RP 185-87. The informant was outside of Medlen's sight for about 10 minutes. RP 205. Soon after the informant entered the residence, Medlen saw a white Honda that had been associated with Nord in the past drive into the driveway and less than 15 minutes later saw the Honda go "rocketing" past him. RP 187-88, 234-35. Medlen remained in communication with the other officers via radio and the informant via text. RP 187. After seeing the Honda leave with the patrol units following it, Medlen went back to the residence, less than a minute after Nord left. RP

188-89, 210. The informant handed him a plastic baggy with what Medlen recognized to be methamphetamine inside it. RP 188-89, 210. There was a quarter ounce of methamphetamine, and $260 was roughly the going rate for a quarter ounce. RP 90-92, 97-98, 218. Medlen searched the informant again and the residence as well this time. RP 189. Medlen didn't find any buy money or other drugs on the informant or in his residence. RP 190.

When Medlen relayed that the Honda would be leaving the residence, officers who were stationed nearby saw the Honda leave the driveway. RP 154-56, 166. They attempted to execute a traffic stop but were unsuccessful. RP 154-56. Nord was identified as the driver. RP 41-42. Officers could see a passenger up front but could not see into the back of the car. RP 42. Nord drove over spikes that had been deployed in the road, blowing out the two front tires. RP 41. Nord looked over at the uniformed officer at the side of the road who had deployed the spikes, said something and looked back straight ahead and took off. The back tires then hit the spikes as well. RP 41. Nord accelerated rapidly. RP 43.

Officers who had been requested to assist in the arrest of Nord, heard the revving of the Honda as it approached their location. RP 218, 220-21. This was sometime between 5 and 6 p.m. at an intersection in Bellingham where there was a fair bit of traffic at that time. RP 222. The

officers had their visible and audible emergency lights and strobes activated. RP 43, 225-26. When Nord came upon the intersection, there were four marked cars pursuing him. RP 43-44. As he turned at the intersection, Nord drove into the oncoming lane of traffic on the other side of the island, causing cars to have to pull over to get out of Nord's path. RP 46, 223-24. Nord pulled back into his lane. As he drove, all tires were flat, with rubber flying off them. RP 224. He continued to use both lanes of traffic as the car went from one side of the road to the other, continuing to cause other cars to pull over to the side of the road. RP 46-47, 224-26. Several times Nord nearly went off the side of the road. RP 227. At one point he blew through a stop sign, despite traffic. RP 45. Nord was going 30-50 miles through the city streets and then up to 70 miles as he neared Lake Padden. RP 47. Nord was now driving only on rims, and sparks were coming of the rims, the car was bottoming out and pieces were chipping off. RP 47-48. Cars continued to have to take action to avoid colliding with Nord. RP 47.

At one point one of the patrol cars got in front of Nord's vehicle in an attempt to force Nord's car to slow down and to alert oncoming traffic. RP 50. As he drove past, the officer saw Nord talking on his cellphone, and he could see that Nord clearly saw him. RP 50. When the officer started to decelerate, Nord accelerated. RP 50. Nord continued to drive all

over the road and into oncoming traffic. RP 51. As they came upon Nulle Road, the lead patrol car pulled off and allowed Whatcom County Sheriff Deputy Nyhus, in his marked vehicle with emergency lights and sounds activated, to pull in behind Nord. RP 51-52. As Nyhus pursued Nord, Nord's car swerved towards Nyhus' vehicle a number of times.[3] RP 117-22. Nord was driving in a more aggressive manner than others Nyhus had pursued before. RP 121. Towards the end of the pursuit, the front passenger held his hands up out of the sunroof for about one mile in what appeared to be a sign of surrender. RP 52.

After a total of over 10 miles of pursuit, the deputy was able to force Nord off the road with a "PIT" maneuver. RP 53, 108, 122-23. Prior to being forced off, Nord threw something out the window of the car to the side of the road, which was later determined to be a cellphone. RP 58, 127-28. Despite commands to turn off the vehicle and to get out, Nord appeared to be trying to get the car back onto the roadway. RP 58. An officer then deployed a non-lethal beanbag round into the back window to obtain visual access, shattering the back window. RP 59-60. A female passenger who was in the back immediately put her hands up in surrender. RP 60. After repeated commands to get out, Nord finally did, but refused

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[3] Details regarding the basis for the third degree assault charge have been omitted because Nord was found not guilty of that charge.

to get on the ground, taking instead a fighting stance and saying "What, what," as if to say what are you going to do about it. RP 61. The officer had to deploy non-lethal beanbag rounds at Nord to get him to comply. RP 62-64.

The car was searched pursuant to a search warrant, and a scale was found inside as well as a box of empty Ziploc baggies, both of which are commonly used in the delivery of drugs. RP 191-93, 157, 162-63, 165. Nord's wallet and social security card were found under the driver's side floorboard along with a baggy of methamphetamine and a cellphone that had the same phone number that the informant had called earlier that day. RP 90-91, 100, 157-60, 164, 200-01. The wallet had over $100 in it, and one of the twenty dollar bills was one of the bills from the pre-recorded buy money. RP 193-95. Six other cellphones were found in the console. RP 162.

While in jail, Nord spoke on the phone with a friend and told him that Cave was the only one he had talked about and dealt "clear," i.e., methamphetamine, with that day. RP 236-37, 241-42, Ex. 15, 20.

D. ARGUMENT

1. The informant's statements to the defendant over the telephone in setting up the drug deal were non-hearsay because they were not offered to prove the truth of the matter but to provide context to his admissions.

Nord asserts that the trial court erred in admitting the informant's statements to him over the phone because they were hearsay. The trial court did not err in admitting them as non-hearsay where the informant's statements were admissible not to prove the truth of the matter asserted, but to provide context to Nord's statements and to make them intelligible as admissions to the jury. Moreover, any error in admitting any testimony was harmless as the substance of the statements that Nord objected to had already been testified to by the detective.

a. *The informant's statements were admissible as non-hearsay.*

Whether the trial court erred in admitting evidence is usually reviewed for abuse of discretion, but whether a particular rule of evidence applies under specifics facts is reviewed de novo. State v. Chambers, 134 Wn. App. 853, 857, 142 P.3d 668 (2006). The admission of hearsay is reviewed for abuse of discretion. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). "Discretion is abused only if the trial court's

'decision is manifestly unreasonable or is based on untenable reasons or grounds.'" Id. at 922.

Statements are not hearsay if they are not offered to prove the truth of the matter asserted. ER 801(c); Chambers, 134 Wn. App. at 859. "It is well settled that non-hearsay statements are admissible if they are offered to provide context." U.S. v. Van Sach, 458 F.3d 694, 701 (7th Cir. 2006), *cert. den.* 549 U.S. 1174 (2007); *see also*, U.S. v. Foster, 701 F.3d 1142, 1150 (7th Cir. 2012) ("admission of recorded conversations between informants and defendants is permissible where an informant's statements provide context for the defendant's own admissions). If statements are not offered for the truth but to make a defendant's responses intelligible and recognizable as admissions, they are not hearsay. U.S. v. Stelten, 867 F.2d 453, 454 (8th Cir. 1988), *cert. den.* 490 U.S. 1050 (1989); *see also*, U.S. v. York, 572 F.3d 415, 427 (7th Cir. 2009) (when offered as context for defendant's admissions, and not the truth, statements of informants on tape recorded conversations are not hearsay); U.S. v. Hendricks, 395 F.3d 173 (3d Cir. 2005) (government permitted to introduce balance of conversations, statements of informant, in order to put the statements of others in perspective and make them intelligible and recognizable as admissions). For example, statements to prove that a dialogue occurred about purchasing drugs are not offered to prove the truth of the matter

asserted because they are not offered to prove what the price was.

Chambers, 134 Wn. App. at 859.

After describing what number the informant called and the mechanics of the phone call, the prosecutor asked if the detective could hear what the person on the other end of the phone was saying...

> A. Yes, sir. The informant was talking to a male wanting to set up a purchase of a certain amount of methamphetamine.
> Q. Okay. And did you recognize the voice on the other end of the phone?
> A. I did. I recognized it as Mr. Nord.
> Q. Okay. And, ah, how long did that phone call continue? How much time elapsed?
> A. Not too long. About a minute. Just long enough for Mr. Cave, the informant, to tell Mr. Nord he was looking for a quarter, which was a quarter ounce and the phone call – do you want me to explain the phone call?
> Q. Well, explain the content if you could, please?
> A. So, Mr. Cave called Mr. (Nord) to say he was interested in buying a quarter.
> Mr. Larson: Objection, hearsay.
> Mr. Chambers: No. The truth of the matter is irrelevant. ...

RP 181-82. After the court permitted the testimony, the detective testified:

> So, Mr. Cave was explaining to Mr. Nord he wanted to buy a quarter ounce of methamphetamine, wanted to hook up with him, which is a common term for meet for the exchange. Mr. Nord explained that he was currently down in Skagit County picking up the product and he would be a few hours before he got back to Bellingham.

RP 183. The detective also testified, without objection, that after a few more phone calls, the informant's residence was agreed upon as the

location for the meeting. RP 183. Another officer had previously testified, without objection, that the residence was the location at which the drug transaction was to occur. RP 40.

Here, clearly Nord's statements on the phone call that he was down in Skagit County picking up product and it would be a few hours before he got back to Bellingham were admissible. However, if they had been admitted without the informant's statements on the phone to Nord, the jury would not have understood that by "product," Nord was referring to drugs, and that in making the statements Nord was agreeing to deliver drugs to the informant. The informant's statements on the phone were admissible to provide context to Nord's admissions and to render them intelligible to the jury.

Nord argues that the prosecutor's use of the informant's statements in closing that "we know that Nord set up a drug deal" shows that the prosecutor at the time of the testimony's admission intended to use the statements to prove the truth of the matter asserted. However, the prosecutor's statements that Nord set up the deal were based on *Nord's* statements on the phone, put in proper context by the informant's statements. Nord stated he was getting "the product" and would be back in Bellingham later. Taken in the context that the informant had asked to hook up to buy methamphetamine, it was clear that Nord was agreeing to

provide drugs to the informant. The prosecutor did not use the statement to prove that the drugs delivered were methamphetamine, just that Nord's statements constituted an agreement to provide drugs.

While the prosecutor's reference in closing to the quantity of methamphetamine could be construed as having been made to prove the truth of the matter asserted, i.e., the amount of drugs delivered, the State didn't need to prove the quantity of methamphetamine delivered. The prosecutor did reference that a deal was set up on the phone for a quarter ounce and that was the amount that was delivered. RP 275. However, Nord did not object to this argument, and he never asked for a limiting instruction on any of the testimony.

Nord cites to the Edwards and Johnson cases, but those cases are distinguishable. In Edwards, the informant's statements sought to be admitted were those that were made to the detective, not to the defendant, and the basis argued for admission was to explain the detective's reason for starting an investigation regarding the defendant, which information the court found was not relevant to an issue in controversy. State v. Edwards, 131 Wn. App. 611, 614-15, 128 P.3d 611 (2006). In Johnson the information that came from the informant was contained in a search warrant affidavit and was double hearsay. State v. Johnson, 61 Wn. App. 539, 545, 811 P.2d 687 (1991). The information was admitted to show the

officer's state of mind when he sought the search warrant, but the search warrant was not challenged and therefore the officer's state of mind was irrelevant. Id. While the officer didn't testify as to the specific statements the informant made to him, he testified that he had reason to suspect the defendant was involved in drug trafficking, and the court determined that the inference from the information was the same as if the statements had been admitted. Id. at 546-547. The statements here, on the other hand, were not admitted to provide context as to why the detective was investigating Nord, but rather to provide context to *Nord's* admissions on the phone, and therefore was relevant.

b. *Any admission of hearsay was harmless*

Evidence erroneously admitted as hearsay can be harmless. "An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial." State v. Halstien, 122 Wn. 2d 109, 127, 857 P.2d 270 (1993). The very information that Nord asserts was erroneously admitted as hearsay evidence had already been admitted without objection. Therefore, any error in admitting the objected-to informant's statements was harmless.

While the prosecutor's closing argument about the quantity of drugs delivered arguably used the informant's statement to prove the truth

of the matter asserted, the State did not need to prove the amount of drugs delivered. All that mattered was that Nord delivered methamphetamine, and the informant's statements concerning his agreement to deliver "product" were clearly non-hearsay. Moreover, the testimony that Nord now complains of, that the informant stated that he wanted to buy a quarter ounce of drugs, was already in evidence before Nord objected to the detective's description of the phone call. Before defense counsel objected to testimony about the content of the phone call, the detective had testified that the phone call had been short: "Just long enough for Mr. Cave, the informant, to tell Mr. Nord he was looking for a quarter, which was a quarter ounce and the phone call ..." In addition, Nord essentially admitted that he delivered methamphetamine in the jail recording of his phone call. Therefore, any erroneous admission of hearsay testimony was harmless. (See further discussion of harmless error in section 2.c. below.)

2. The informant's statements on the phone did not violate the Confrontation Clause because they weren't testimonial statements and weren't offered to prove the truth of the matter asserted.

Nord asserts that his confrontation clause rights were violated when the detective testified to what the informant said on the phone to Nord when the drug deal was set up. First, Nord waived his ability to raise this issue on appeal when he failed to move to compel production of

the informant at trial. Second, an informant's statements in setting up a drug deal with a defendant are not "testimonial" statements. Even if they were testimonial statements, they were not offered to prove the truth of the matter asserted and therefore did not violate the Confrontation Clause. Moreover, any error in admitting testimony regarding the informant's statements on the phone was harmless where the evidence showed that Nord agreed to provide product and arranged to make the delivery at the informant's house, the amount of drugs the informant gave to the detective matched the amount of money the informant gave to Nord, some of the pre-recorded money was found in Nord's wallet, Nord tried to flee apprehension, and he admitted to having given the informant drugs that day.

a. Nord may not raise a violation of the Confrontation Clause for the first time on appeal

Under the Sixth Amendment to the U.S. Constitution and Art. 1 Section 22 of the State Constitution a defendant has a right to confront the witnesses against them. However, the right must be asserted at trial or is lost. "A clear line of decisions—*Melendez–Diaz*, *Bullcoming*, *Jasper*, and *Hayes*—requires that a defendant raise a Sixth Amendment confrontation clause claim at or before trial or lose the benefit of the right." State v. O'Cain, 169 Wn. App. 228, 248, 279 P.3d 926 (2012). A confrontation

clause claim is also lost under Art. 1 Section 22 if not asserted at trial. Id. at 252. Nord did not assert that admission of the informant's statements violated his right to confrontation at trial. He therefore may not raise this issue for the first time on appeal.

b. The informant's statements were not testimonial, nor offered for the truth of the matter asserted, and therefore did not violate the Confrontation Clause

Even if Nord could assert a confrontation clause claim for the first time on appeal, the informant's statements were not "testimonial" as they were not solemn declarations that were admitted to establish a fact. Nor were they offered to prove the truth of the matter asserted, and therefore were not in violation of the Confrontation Clause.

Confrontation clause claims are reviewed de novo. Mason, 160 Wn.2d at 922. Admission of testimonial statements violates a defendant's confrontation clause rights unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness regarding the statement. Crawford v. Washington, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). Testimonial statements are typically those that are solemn declarations that are made for the purpose of proving some fact, and include: (1) ex parte in-court testimony; (2) extrajudicial statements like affidavits; and (3) "statements made under circumstances

that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." Chambers, 134 Wn. App. at 860-61. In Davis v. Washington, the U.S. Supreme Court described "testimonial" statements to law enforcement as those that are made when there is no on-going emergency, and the primary purpose of the police interrogation "is to establish or prove *past* events potentially relevant to later criminal prosecution." Mason, 160 Wn.2d at 918-19 (quoting Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266, 2273-74, 165 L.Ed.2d 224 (2006)) (emphasis added). Casual remarks are not the kind of formal statement that is contemplated as "testimonial" under the confrontation clause. Id. at 862.

For example, in Brown v. Epps, 686 F.3d 281 (5th Cir. 2012), a government informant's conversations regarding drug deals with two unidentified individuals were recorded and admitted into evidence. Id. at 283-284. The defendant was the driver of the vehicle that delivered the drugs. Id. at 283. In determining whether statements are testimonial the court emphasized that it was important to distinguish between statements about events as they were happening and those that described past events. Id. at 287. It concluded that the unidentified individuals' statements on the recordings were not testimonial because the exchange was casual for the purpose of setting up a drug deal and were not "solemn declarations

made for the purpose of establishing some fact." Id. at 288. While the court did not have to address the issue of the informant's statements on the recordings as the informant testified, the court noted that "even if [the informant] had not appeared at trial, his statements might have been admissible to put the identified individuals' statements into context and to make them intelligible to the jury." Id. at 288 n.37.

The confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 60 n.9; State v. Fraser, 170 Wn. App. 13, 21, 282 P.3d 152 (2012), *rev. den.*, 176 Wn.2d 1022 (2013). Informants' statements made during the course of a controlled purchase of contraband which provide context and are not offered to prove the truth of the matter asserted are non-testimonial, and therefore are not implicated by Crawford. Van Sach, 458 F.3d at 701; *see also*, State v. Rangel-Reyes, 119 Wn. App. 494, 498, 81 P.3d 157 (2003) (verbal acts of third party to drug deal were not offered to prove truth of matter asserted and therefore were not hearsay and did not violate confrontation clause).

A number of federal courts treat informant statements to a defendant in setting up a drug deal as non-hearsay that does not violate the Confrontation Clause because the statements aren't offered to prove the truth of the matter. In U.S. v. FosterId. at 1150-1151 the court held: "The

admission of recorded conversations between informants and defendants is permissible where an informant's statements provide context for the defendant's own admissions." Foster, 701 F.3d at 1150. It so held because such statements are not offered to prove the truth of the matter, and therefore do not violate the Confrontation Clause. Id. at 1150-51; *see also*, U.S. v. Gaytan, 649 F.3d 573 (7th Cir. 2011), *cert. den.* 132 S.Ct. 1129 (2012) ("confidential informant's out-of-court statements are not hearsay if they are offered not for the truth but to put the defendant's statements in context or to make what he said and did in reaction to the informant's statements intelligible to the jury"); U.S. v. York, 572 F.3d 415 (7th Cir. 2009) (admission of recorded conversations between informants and defendants does not violate Confrontation Clause as long as tapes are offered to provide context for defendant's admissions and not for truth). The defendant in Foster also argued that some of the informant's statements were hearsay because they were used by the government in closing to show that that the defendant was guilty, as Nord does. The court denied this, finding that the statements were not offered to show that the drugs were of a particular quality, but were used to clarify the defendant's responses to the jury. Foster, 701 F.3d at 1151.

Nord asserts that the informant's statements testified to by the detective fall within the third category of "testimonial" statements,

"statements made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." The court in U.S. v. Hendricks acknowledged the appeal of such an analysis but ultimately discounted it. U.S. v. Hendricks, 395 F.3d 173, 182-83 (3rd Cir. 2005). It acknowledged that while an informant's statements could be viewed as those which the informant could expect to be used in a prosecution, it noted that the U.S. Supreme Court in Crawford cited with approval to the Bourjaily v. United States[4] opinion as an example of a case that was consistent with the "principle that the Sixth Amendment permits the admission of nontestimonial statements in the absence of a prior opportunity for cross-examination." Hendricks, 395 F.3d at 183. The Bourjaily opinion addressed admissibility of statements made by a purported co-conspirator to an informant. Id. at 183. The court concluded "if a Defendant or his or her coconspirator makes statements as part of a reciprocal and integrated conversation with a government informant who later becomes unavailable for trial, the Confrontation Clause does not bar the introduction of the informant's portions of the conversation as are reasonably required to place the defendant or coconspirator's nontestimonial statements into context." Id. at 184.

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[4] Bourjaily v. United States, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987).

Similarly, the informant's statements here put Nord's admissions into context, to show that Nord was agreeing to give the informant drugs, and therefore not did not violate the Confrontation Clause. They were not "testimonial" statements either, in that they were not the kind of solemn declaration made to establish a past fact that the Confrontation Clause is aimed at prohibiting.

c. Any error in admission of the informant's statements was harmless

Confrontation clause violations are subject to harmless error analysis. State v. Flores, 164 Wn.2d 1, 18, 186 P.3d 1038 (2008). Such an error is harmless if the properly admitted evidence is so overwhelming as to necessarily lead to a finding of guilt. Id. at 18-19.

> "Confrontation Clause errors [are] subject to Chapman harmless-error analysis." ... Under this standard, the State must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." ...
>
> > Whether such an error is harmless in a particular case depends upon a host of factors ... includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

State v. Jasper, 174 Wn. 2d 96, 117, 271 P.3d 876 (2012) (quoting Delaware v. Van Arsdall, 475 U.S. 673, 684, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986)) (internal citations omitted).

Here, the State's case, while circumstantial, was strong and the evidence regarding the delivery of the methamphetamine corroborated by the fact that the weight of the drugs actually delivered was a quarter ounce and the amount of money given to the informant to purchase the drugs was for a quarter ounce. Without the testimony regarding the informant's statements, the evidence presented to the jury included that Nord said he would bring the "product" to the informant later that day; the informant was given pre-recorded drug money, money that was sufficient to buy a quarter ounce of methamphetamine; a car associated with Nord was seen driving into the informant's driveway, the place that the informant had arranged with Nord for the delivery; the informant gave the detective a quarter ounce of methamphetamine immediately after Nord drove away from the informant's house; when officers signaled for Nord to pull over his vehicle, Nord tried to flee; a baggy of methamphetamine was found on the driver's side floorboard next to Nord's wallet at the end of the chase; and Nord admitted in a jail recording that the informant was the only one with whom he had dealt "clear," methamphetamine, that day. Even if Nord had preserved a confrontation clause challenge, any error would have been harmless. (Similarly, Nord would not be able to meet his burden to establish a manifest error of constitutional magnitude because he would not be able to establish that the error was manifest, i.e., prejudicial.)

3. Under the post-verdict liberal standard of review, the element of "willfully" can be fairly implied from the rest of the language in the information.

Nord next asserts that the attempting to elude conviction should be dismissed without prejudice because the information did not include all the essential elements of the charge. However, under the applicable post-verdict liberal construction standard, the essential element of "willfully" failing to stop can be fairly implied from the charging language as a whole, specifically the reference that he committed the offense while attempting to elude the police vehicle. Nord has failed to allege any specific prejudice from the inartful language in the information, and therefore the charge does not need to be dismissed.

A charging document is constitutionally adequate only if all of the essential elements, statutory and non-statutory, are included in the document so as to place the defendant on notice of the charges and allow the defendant to prepare a defense. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991). When the sufficiency of a charging document is challenged for the first time on appeal, courts liberally construe the information in favor of validity. Id. at 103. A different standard of review is employed post verdict in order to "encourage defendants to make timely challenges to defective charging documents and to discourage

'sandbagging,' i.e., waiting to assert a defect in the charging document because asserting it in a timely manner would only result in an amendment of the information. Id. Under the liberal construction rule, the court inquires: (1) do the necessary elements or facts appear in any form, or can the alleged missing element or fact be fairly implied from the language within the information; and (2) can the defendant show that he or she was actually prejudiced by the inartful language. State v. McCarty, 140 Wn.2d 420, 425, 998 P.2d 296 (2000); Kjorsvik, 117 Wn.2d at 105-06. If the information failed to allege the essential elements, the charge is dismissed without prejudice to refile. McCarty, 140 Wn.2d at 428.

An essential element is one whose specification is necessary to establish the very illegality of the behavior charged. State v. Ward, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). "Essential elements consist of the statutory elements of the charged crimes and a description of the defendant's conduct that supports every statutory element of the offense." State v. Powell, 167 Wn.2d 672, 682, 223 P.3d 493 (2009), *overruled on other grounds,* State v. Siers, 174 Wn.2d 269, 274 P.3d 358 (2012). It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as 'those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements

necessary to constitute the offence intended to be punished.' Kjorsvik, 117 Wn.2d at 100.

> The essential elements of attempting to elude are:
>
> ... a suspect must (1) willfully fail (2) to immediately bring his vehicle to a stop, (3) and drive [in a reckless manner][5] (4) while attempting to elude a police officer after having been signaled to stop by a uniformed officer."

State v. Tandecki, 153 Wn.2d 842, 848, 109 P.3d 398 (2005). "Willfully" is an element of the offense of attempting to elude. State v. Flora, 160 Wn. App. 549, 553, 249 P.3d 188 (2011). To be guilty of the offense, the defendant must "willfully fail and refuse to stop his vehicle while attempting to elude a pursuing police vehicle." Id. (quoting State v. Mather, 28 Wn. App. 700, 702, 626 P.2d 44 (1981)). Failure to *immediately* stop is an essential element of the offense, but is sufficiently alleged by language informing the defendant that s/he attempted to elude the officer after failing to stop. Tandecki, 153 Wn.2d at 848-49.

In determining that "immediately" was an essential element of attempting to elude, the court in Tandecki found the Court of Appeal's rationale reasonable, although it concluded that 'immediately" was an element. Id. at 848. The Supreme Court in Tandecki noted that the Court

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[5] The third essential element referenced in Tandecki was "drive in a manner indicating a wanton and willful disregard for the lives or property of others," however the statute was amended in 2003 to change this element to "in a reckless manner." Naillieux, 158 Wn. App. at 644.

of Appeals had concluded that it is "self evident that a driver has not stopped when he eludes an officer." Tandecki, 153 Wn.2d at 848 (quoting State v. Tandecki, 120 Wn. App. 309, 84 P.3d 1262 (2004). The Court of Appeals decision referenced the Stayton decision in concluding that the elements of the offense were interlocking. Id.

In Stayton, the court held:

> The first element is that a uniformed police officer whose vehicle is appropriately marked must give the potentially errant driver of a motor vehicle 'a visual or audible signal to bring the vehicle to a stop.' Next, the driver must be a person who 'willfully fails or refuses to immediately bring his vehicle to a stop...' The willful failure to do so implies knowledge that a signal has been given. The third element is that, "while attempting to elude a pursuing police vehicle," the driver 'drives his vehicle in a manner indicating a wanton and [or] willful disregard for the lives or property of another."

State v. Stayton, 39 Wn. App. 46, 49, 691 P.2d 596 (1984), *rev. den.* 103 Wn.2d 1026 (1985). The court went on to rationalize that there could be no "attempt to elude" without prior knowledge that there was a pursuing vehicle, and that there could be no willful failure to stop without prior knowledge that a qualifying signal had been given by an officer. Id. at 49-50. It also found that the qualifying signal could be given by an officer who was in a pursuing vehicle. Id. at 50. Under the Stayton decision, all the elements of felony eluding are interdependent.

The final information[6] here alleged:

> That on or about the 10th day of April 2013, the said defendant, ALAN JOHN NORD, then and there being in said county and state, did fail to immediately bring his vehicle to a stop after a uniformed office (sic) driving an appropriately marked police vehicle, equipped with emergency lights and siren, gave a visual or audible signal to bring his vehicle to stop and did drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle in violation of RCW 46.61.024.

CP 13-15. While "willfully" is an essential element of the crime of attempt to elude, following the rationale in Stayton, under the liberal post-verdict review, the "willfully" element can be fairly implied here from the allegation that Nord failed to immediately stop, after having been ordered to do so, and while attempting to elude the officer. "Attempting to elude" means that Nord was trying to, intending to, flee or evade the officer by failing to stop. Under a liberal construction, that implies that he did so willfully.

Nord asserts that under the rationale in Naillieux, the information here was insufficient even under a post-verdict liberal construction because the court there found that "in a reckless manner" could not be implied from the language "in willful and wanton disregard." In Naillieux, the defendant had mistakenly been charged under the prior statutory language, and, in addition to not using the amended statutory language "in

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[6] There were two prior informations, but both of them also did not include the term "willful." CP 4-6, 9-11.

a reckless manner," the information also failed to include language "equipped with lights and sirens" instead of the previous language regarding appropriately marked police vehicle. State v. Naillieux, 158 Wn. App. 630, 643-44, 241 P.3d 1280 (2010). The court found that the amendment removed the "willful and wanton" standard from the statute and that "in a reckless manner" had a specific meaning distinct from "willful and wanton" and meant "in a rash or heedless manner, with indifference to the consequences." Id. at 644.

Naillieux is distinguishable from the language in this information because the court there was concerned with a change in the legal standard which it found was substantive and not otherwise found in the language of the information. Nord's concern that he could be found guilty simply because he failed to stop after police signaled him to do so is unfounded because the language also requires that he failed to stop while attempting to elude the pursuing vehicle. That language implies that he did so willfully.

Nord has failed to allege any specific prejudice from the language of the information. He cannot do so because he essentially conceded all the elements of the attempting to elude charge in opening and closing, except for the "in a reckless manner" element. RP 285, 304. Moreover, this was an elude that went on for 10 miles, Nord drove on rims for most

of the pursuit, a couple officers testified they saw Nord look specifically at them, and there were three to four marked patrol cars that were chasing Nord with their lights and sirens on. Therefore, given that there was no prejudice, and that under a liberal construction the term "willfully" can be implied from the charged language for the attempting to elude, this Court should not reverse the elude conviction.

4. The trial court did not abuse its discretion in denying an unwitting possession instruction because there was no evidence presented that Nord did not know the drugs were in the car he was driving.

Nord also asserts that the trial court erred in failing to instruct the jury on unwitting possession per his request. Given that there was no evidence indicating that Nord did not know the drugs were in his car, the trial court did not abuse its discretion in failing to instruct the jury on unwitting possession.

Instructions are sufficient if they properly inform the jury of the applicable law without misleading the jury and permit each party to argue its theory of the case. State v. Bennett, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007). A defendant is not entitled to an instruction that is not a correct statement of the law or for which there is insufficient evidentiary support. State v. Staley, 123 Wn.2d 794, 803, 872 P.2d 502 (1994). "A trial court's decision regarding a jury instruction is reviewed for abuse of

discretion if the decision is based on factual issues." State v. Souther, 100 Wn. App. 701, 708, 998 P.2d 350, *rev. denied*, 142 Wn.2d 1006 (2000), *accord*, State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

In order to warrant giving an instruction on an affirmative defense, there must be sufficient evidence for a reasonable juror to find, by a preponderance of the evidence, the affirmative defense applies. State v. Buford, 93 Wn. App. 149, 153, 967 P.2d 548 (1998). While a court interprets the evidence most strongly in the defendant's favor, "[a] defendant raising an affirmative defense must offer sufficient admissible evidence to justify giving an instruction on the defense." State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). The "unwitting possession" is a judicially created defense that the excuses the defendant's conduct, and the defendant bears the burden of demonstrating that his/her possession was unwitting. Buford, 93 Wn. App. at 151-52. A defendant is not entitled to an unwitting possession instruction "unless the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband." Id. at 153. Error in failing to give such an instruction is harmless if the appellate court is convinced beyond a reasonable doubt that the jury would have reached the same verdict despite the error. State v. Mills, 154 Wn.2d 1, 15 n. 7, 109 P.3d 415 (2005).

In Buford, the trial court denied the request for an unwitting possession instruction because it found that there was no evidence by which the jury could infer or determine that the possession was unwitting. On appeal, the defendant's claim that his possession was unwitting was based on the small amount of cocaine that was scraped out of the pipe. Buford, 93 Wn. App. at 153. The defendant didn't testify or present any evidence to rebut the state's case in chief. Id. at 150.

Similarly, Nord did not testify nor present any evidence to rebut the State's case here. Nord asserts he was entitled to the instruction because the drugs were found on the floor of the Honda, there wasn't any evidence that the car belonged to Nord and there were two other persons in the car with him. He speculates that the drugs could have slid around on the floor of the car, but there was no evidence presented that that occurred. Other evidence that was presented demonstrates that there wasn't sufficient evidence to warrant an unwitting possession instruction: Nord was fleeing from a drug delivery for the same substance that was found in the car, a car had previously been associated with Nord; Nord's wallet and cellphone were found *under the drivers' floorboard* with the bag of methamphetamine; Nord had thrown another cellphone out the window of the car and there were other cellphones found in the console; a scale was and box of Ziploc bags were found in the car; Nord had said on

the phone that he was picking up "product" in Skagit County earlier that day; a $20 bill of the pre-recorded buy money was found in Nord's walle;, and Nord stated in the jail recording that the informant was the only person he'd given "clear," methamphetamine, to that day. Based on all the evidence presented, the trial court did not abuse its discretion in concluding that there wasn't sufficient evidence presented to permit a reasonable juror to find, by a preponderance of the evidence, that Nord's possession was unwitting.

5. To the extent that any of the prosecutor's remarks were improper, they did not create an incurable prejudice.

Nord asserts that the prosecutor made a couple remarks in closing that created an incurable prejudice to his case, including an appeal to the jury's emotions. To the extent that the prosecutor's remark in closing can be interpreted as a request that the jury find Nord guilty so that the deputy wouldn't feel his efforts were for nothing, they were improper. However, the prosecutor did not compare Nord to a madman, as he alleges, and the prosecutor's remark comparing Nord's *driving* to that of a madman was not improper particularly given Nord's driving in this case. The prosecutor's remarks regarding the deputy's "heroic" efforts were isolated, were tempered by the prosecutor advisement to the jury to base its verdict on the evidence and defense counsel's reminders to the jury that its verdict

could not be based on sympathy. The remarks did not create an incurable prejudice.

A prosecutor's comments in closing must be viewed in context of the entire closing argument, the issues in the case, the evidence presented and the jury instructions given. State v. Russell, 125 Wn.2d 24, 85-86, 882 P.2d 747 (1994). A prosecutor may argue reasonable inferences from the record to the jury. State v. Hoffman, 116 Wn.2d 57, 94-95, 804 P.2d 577 (1991). "Reversal is not required if the error could have been obviated by a curative instruction which the defense did not request." Russell, 125 Wn.2d at 85. Defense counsel's decision not to object or move for a mistrial is strong evidence that the prosecutor's argument was not critically prejudicial to the appellant. State v. Swan, 114 Wn.2d 613, 661, 790 P.2d 610 (1990).

Nord misconstrues the prosecutor's comment about a "madman" and takes it out of context. In discussing the evidence regarding the delivery, the prosecutor argued that Nord's fleeing the scene was tanatamount to a confession. RP 280. He argued:

> ... And then the fundamental conclusion is you are just involved with a methamphetamine transaction, you know, you are involved with it, and the cops spike your tires. What do you do? You take off and drive like a madman for almost ten miles out to Lake Samish because you know you are in a heck of a lot of trouble. That's as much of a confession and admission as the statements on

> the recorded jail line. Why would you take off and drive in that manner to get away on the rims of your car? Car wheels.

RP 280-81. The prosecutor then went on to address the possession of methamphetamine count and the attempting to elude charge. RP 282-87.

The prosecutor's comments about the deputy's efforts, on the other hand, were made in the context of his argument regarding the assault charge. RP 287-91. The prosecutor argued that Nord should be found guilty of third degree assault because of Nord's purposeful efforts to ram and to prevent the deputy from pulling alongside his car. RP 289-90. He then explained that the deputy felt afraid and concerned for his safety, but that he continued to try to stop Nord's car because of the danger Nord was presenting to other vehicles on the road. RP 290-91.

> But he persisted. You know, the question is meanwhile if you are afraid and you didn't want to have a collision, you are afraid of pursuing him, why didn't you just stop? Why didn't you just stop trying to pull him over and he goes because he was so dangerous going out in the roadway, I had to. Whether or not I was afraid or not of what he was going to do, I had to try to stop him and the State submits that's the kind of selfless and heroic, if you will, action. (sic) We admire and respect in our law enforcement officers and we are so glad they are willing to do and perform on a daily based (sic) to protect us.
> Don't tell the deputy. Don't tell him that it was just like – it's no big deal. Him getting swerved at by the evidence out there. Just say that to him after what he did because we know that he was eventually successful. ...

RP 290-91. The prosecutor emphasized the deputy's "selfless," repeated efforts to stop Nord's car, despite Nord's actions, because in the context of

assault in third degree the jury had to find that Nord's actions actually created apprehension and fear of bodily injury. However, the prosecutor's argument apparently was not convincing to the jury because they found Nord not guilty of the assault charge.

Moreover, the prosecutor started his closing directing the jury to base their verdict solely on the evidence, and not on emotions, and ended by arguing that based solely on the evidence that the jury would be able to convict Nord of the charges. RP 273, 292. Defense counsel, instead of objecting, chose to address this alleged appeal to passion or prejudice by reminding the jury not to let emotions factor into their verdict. RP 303.

> I think part of what the State's argument about what a hero Deputy Nyhus is, I think is trying to play on to that prejudice, that sympathy, that emotion and that just cannot be a part of a criminal justice, it cannot be a part of a trial. It has to be based on the facts.

RP 303.

Obviously, defense counsel did not find that the prosecutor's comments about the deputy's efforts required an admonition by the court, and chose not to object, but to address the issue himself with the jury. Certainly the objectionable comments were not prejudicial, as the jury found Nord not guilty on the assault count. Furthermore, they certainly could have been cured by an instruction from the court not to let sympathy

or emotions factor into their deliberations, as instruction number one also directed the jury. CP 26-27.

The prosecutor did not compare and contrast Nord and the deputy's actions, as Nord implies. His reference to Nord's driving being like that of a madman used a fairly familiar colloquialism, and did not imply that Nord himself was a madman but that his driving was because it was incomprehensible that one would drive on rims for 10 miles, continuing to try to evade police and endangering lives of others in doing so. The prosecutor's comments were not so flagrant as to cause an incurable prejudice.

6. The entry of convictions on both possession of methamphetamine and unlawful delivery of methamphetamine did not violate double jeopardy because they were clearly based on separate conduct.

Nord asserts that the trial court erred in determining that entry of convictions on both the possession of methamphetamine and the delivery of methamphetamine did not violate double jeopardy. The record shows, however, that the jury was informed, based on counsels' closings and the jury instructions, that the act that formed the basis of the possession charge differed from the act that formed the basis of the delivery charge. Therefore the trial court did not err in finding the two convictions did not violate double jeopardy.

In asserting there was a violation of double jeopardy provisions, Nord faults the lack of a "separate and distinct" jury instruction regarding the delivery and possession charges. Jury instructions that fail to inform a jury that certain counts are based on acts that are separate and distinct from other counts potentially expose a defendant to multiple punishments for a single offense. State v. Mutch, 171 Wn.2d 646, 663, 254 P.3d 803 (2011).

> ...[F]lawed jury instructions that permit a jury to convict a defendant of multiple counts based on a single act do not necessarily mean that the defendant received multiple punishments for the same offense; it simply means that the defendant *potentially* received multiple punishments for the same offense. "In order to violate federal and state double jeopardy standards, there must be multiple punishments for the 'same offense.'

Mutch, 171 Wn. 2d at 663. In order to determine whether a defendant actually received multiple punishments for the same offense, the court reviews the entire record before it. Id. at 663-664. In conducting its review of the evidence, instructions and arguments of counsel, it must be manifestly clear that each count was based on a separate act or there is a double jeopardy violation. Id. at 664. The remedy for such a violation is to vacate the redundant conviction. Id. Double jeopardy violations are generally reviewed de novo. State v. Knight, 176 Wn. App. 936, 952, 309 P.3d 776 (2013), *rev. den.*, 179 Wn.2d 1021 (2014).

There is no need, however, to instruct the jury as to specific acts underlying each charge where "there is no evidence of jury confusion as to the factual basis for each count." State v. Fisher, 74 Wn. App. 804, 817-18, 874 P.2d 1381 (1994), *vacated in part on other grounds* by State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). "[W]here separate crimes are charged, evidence is presented on each charge, and the argument of counsel clearly identifies the acts corresponding to each charge," any potential double jeopardy violation is obviated. Id. at 818.

In Fisher, the defendant asserted that his convictions for delivery of cocaine and possession with intent to deliver cocaine violated double jeopardy because they could have been based on the same act. Undercover officers arranged to purchase cocaine and entered into an apartment where the defendant and his girlfriend were sitting on a couch. Fisher, 74 Wn. App. at 807. The defendant directed the girlfriend to sell the cocaine to the officers, and she gave one of the officers one of two cocaine rocks. The other officer declined to purchase the second, smaller, rock. As they were leaving, one of the officers asked if they could come back later to buy more, and the defendant said there would be more drugs later. Id. When defendant and his girlfriend were arrested, one rock was found on the girlfriend. The court denied defendant's double jeopardy claim finding there was no confusion as to which acts supported the

separate counts because the prosecutor had distinguished between the delivery charge as it related to the sale to the officer and the possession with intent to deliver as it related to the remaining rock found in the girlfriend's possession. Id. at 818.

Similarly here, assuming that possession of a controlled substance and delivery of a controlled substance constitute the same offense in law and fact under the Blockburger test, the delivery count and the possession count were based on separate acts, as was made clear to the jury in closing.[7] Here, the jury was informed that a separate crime was charged in each count, and that their decision regarding one count should not control their verdict on another. CP 32 (Inst. 6). For count I, the delivery, the jury was instructed they had to find that Nord *or an accomplice* delivered the methamphetamine. CP 34 (Inst. 8) (emphasis added). They were also instructed to find Nord guilty of the possession count, they had to find that Nord possessed methamphetamine. CP 40 (Inst. 14). They were further instructed as the definition of possession and that possession may be actual or constructive, further defining constructive possession. CP 41 (Inst. 15). The testimony at trial identified two separate exhibits of methamphetamine, Ex.16, the quarter ounce that was delivered to the

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[7] *See*, State v. Knight, 176 Wn. App. 936, 951-53, 309 P.3d 776 (2013), *rev. den.*, 179 Wn.2d 1021 (2014) (setting forth three part test for double jeopardy claims)

informant, and Ex. 17, the bag of cocaine found on the floorboard on the driver's side of the Honda at the end of the pursuit, both of which were tested and found to be methamphetamine. RP 90-92, 97-98, 100, 189. The prosecutor referred to the delivered cocaine on a couple occasions in closing as the "quarter ounce," and argued that the jury could find Nord guilty as either a principal or an accomplice because he set up the deal. RP 275-77, 280. The prosecutor then addressed the cocaine that was found in the Honda after the pursuit, noting that that cocaine was found on the floorboard of the seat in which Nord had been sitting:

> And that's the point in time to focus on. Was he in possession? Was he in control of that bindle at the time he was sitting there on the side of the road revving his engine, his wheels... .. That's the point in time to consider whether he is in possession of that methamphetamine. Because that's when he gets out of car.... but as he gets out and leaves his wallet and cellphone and he leaves the bindle of meth right there on the floorboards (sic) of the car"

RP 282-83. The prosecutor then directed the jury to the possession instruction and explained constructive possession to the jury. RP 283. He continued:

> When Mr. Nord got out of his vehicle, he had the same kind of dominion and control over the location, that being the floorboard beneath his seat as he was seated as he would have if he had that methamphetamine in his pockets. ... do you think anybody else could reach down there with him sitting that seat and grab that methamphetamine? ... So he was in possession of that methamphetamine under the constructive possession type of definition."

RP 283-84. Defense counsel reminded the jury that each charge is a separate crime. RP 309. It was clear to the jury from the instructions and the argument of counsel that the delivery count was based on Nord being either a principal or accomplice to the delivery that occurred prior to the pursuit, and the possession was based on the drugs found in the car at the end of the pursuit.

When defense counsel asserted at sentencing that the two offenses were the same offense and therefore the possession should be vacated, the trial court disagreed and found that the delivery was based on the cocaine delivered prior to the pursuit and the possession on the methamphetamine found in the car after the pursuit. It is clear from all the evidence in the record, the instructions and the closing arguments, that entry of convictions for possession of methamphetamine and delivery of methamphetamine under the facts of this case does not violate double jeopardy.

7. No resentencing is required unless this Court were to reverse the eluding conviction.

Nord requests resentencing if the Court reverses the eluding conviction regardless of his offender score. The State submits that no resentencing is necessary because the attempting to elude conviction should be upheld. However, were this Court to dismiss the attempting to

elude without prejudice, the State would agree that resentencing would be appropriate as the trial court did rely heavily on the attempting to elude conviction in deciding what sentence within the standard range to impose. RP 343-44.

E. CONCLUSION

The State respectfully requests this Court to deny Appellant's appeal and affirm his convictions for unlawful possession of methamphetamine, unlawful delivery of methamphetamine and attempting to elude a pursuing police vehicle.

Respectfully submitted this 30th day of August, 2014.

HILARY A. THOMAS, WSBA #22007
Appellate Deputy Prosecutor
Attorney for Respondent
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CERTIFICATE

I certify that on this date I placed in the U.S. mail with proper postage thereon, or otherwise caused to be delivered, a true and correct copy of the document to which this certificate is attached, to this Court and appellant's counsel of record, addressed as follows:

RICHARD LECHICH
1511 3RD AVE, STE. 701
SEATTLE, WA 98101

Legal Assistant

8/30/14
Date