

**NO. 68369-1-I**

IN THE COURT OF APPEALS – STATE OF WASHINGTON  
DIVISION ONE

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STATE OF WASHINGTON  
Respondent,

v.

**JEFFREY HUYNH,**  
Appellant.

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COURT OF APPEALS DIV 1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

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**RESPONDENT’S BRIEF**

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## **I. SUMMARY OF ARGUMENT**

Jeffrey Huynh was convicted of possession with intent to manufacture or deliver a controlled substance and conspiracy to deliver a controlled substance after arranging purchase of two kilograms of cocaine.

Huynh contends possession with intent to manufacture or deliver is an alternative means crime and there was insufficient evidence of possession with intent to manufacture or deliver. Since both manufacture and delivery involve the same subject those are not alternative means. In addition the expert testimony of the cost, purity and purpose of purchasing the kilograms of cocaine, established sufficient evidence for a jury to conclude there was the intent to process or package the cocaine.

Huynh also contends evidence was insufficient to support all the methods of committing the aggravating circumstance as a major violation of the uniform controlled substances act. However, aggravating circumstances are not alternative means and there was evidence supporting each of the factors of a major violation of the uniform controlled substances act.

Finally, Huynh contends severance of offenses and co-defendants was improperly denied. Huynh cannot establish the trial court abused its discretion or that he was prejudiced.

The appeal must be denied and the convictions affirmed.

## II. ISSUES

1. Is possession with intent to manufacture or deliver a controlled substance a crime with alternative means of manufacture or delivery?
2. Where two kilograms of pure cocaine is purchased for \$42,000, and expert testimony is presented that the drug is purchased to be processed and repackaged to make money, was there sufficient evidence to support a jury finding the drugs were possessed with intent to manufacture?
3. Are aggravating factors supporting sought to impose an exceptional sentence equitable to elements of offenses such that proof of each provision of the aggravating factor must be proven beyond a reasonable doubt to assure unanimity?
4. Where a defendant drove from Oregon and took time to carefully arrange a two kilogram purchase of cocaine for \$42,000 was there evidence of a major violation of the uniform controlled substances act?
5. Where a defendant has not established inconsistent defenses between manufacture or deliver a controlled substance and conspiracy to deliver a controlled substance of the same

transaction, did he establish the trial court abused its discretion in denying severance and that he was prejudiced?

6. Where the co-defendant's statements were redacted and the expert testimony about the processing of the high volume and quality of drugs for later was admissible against both co-defendants, did the defendant establish the trial court abused its discretion in denying severance and that he was prejudiced?

### **III. STATEMENT OF THE CASE**

#### **1. Statement of Procedural History**

On May 24, 2011, Jeffrey Huynh was charged with Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance alleged to have occurred on May 20, 2011. CP 1-2. The State provided a notice of intent to seek an exceptional sentence based upon the major violation of the uniform controlled substances act. CP 2.

Jeffrey Huynh arranged with an undercover police officer to buy drugs. CP 6. The deal was discussed at a Mount Vernon restaurant with Mak and Huynh present. CP 141-2. After exchanging the money, the undercover officer gave two kilograms of cocaine and a smaller bag of cocaine to Mak. CP 142. Mak concealed the cocaine in the trunk of his vehicle. CP 142. Officers stopped the vehicle a short distance away. CP 142. Mak and Huynh were arrested. CP 142. Huynh claimed he had just sat

down at the table and had no idea a drug deal was occurring. CP 143. A search warrant executed on the vehicle revealed the bag with cocaine, the jacket used to conceal the money, and numerous cell phones. CP 143..

On January 17, 2012, the State amended the information to clarify the number of participants involved in the conspiracy to deliver. CP 281-2.

On January 23, 2012, the case went to trial. 1/24/12 RP 3.<sup>1</sup>

On January 27, 2012, the jury returned verdicts finding Huynh guilty of Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance. CP 81, 82.

The jury also returned special verdicts finding that the Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a

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<sup>1</sup> The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. Defense has chosen to refer to reports by numbers. The report of proceedings in this case are as follows:

7/28/11 RP	Continuance Hearing	1RP
8/16/11 RP	3.5 Hearing	1RP
9/8/11 RP	Continuance Hearing	1RP
9/22/11 RP	Continuance Hearing	1RP
10/14/11 RP	Continuance Hearing	1RP
11/23/11 RP	Continuance Hearing	1RP
12/1/11 RP	Continuance Hearing	2RP
12/14/11 RP	Suppression Motion and Continuance Hearing	3RP
1/4/11 RP	Suppression and Severance Motions	4RP
1/13/11 RP	Suppression and Severance Motions	1RP
1/23/12 RP	Trial Day 1 (in volume with second day of trial)	5RP
1/24/12 RP	Trial Day 2 (in volume with first day of trial)	5RP
1/25/12 RP	Trial Day 3	6RP
1/26/12 RP	Trial Day 4	7RP
1/27/12 RP	Trial Day 5	8RP
2/10/12 RP	Sentencing	2RP.

Controlled Substance were major violations of the uniform controlled substances act. CP 83, 84.

On February 10, 2012, the trial court sentenced Huynh to an exceptional sentence of 96 months of prison time on Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance. CP 114.

On February 24, 2012, Huynh timely filed a notice of appeal. CP 130-3.

## **2. Statement of Facts**

### **i. Summary of Trial Testimony<sup>2</sup>**

Seim Delacruz is an agent with border patrol who was working as an undercover officer with the Skagit County Interlocal Drug Enforcement Task Force in 2011. 1/24/12 RP 57, 59. Agent Delacruz worked trying to dismantle drug trafficking organizations by acting as a mid-level dealer. 1/24/12 RP 61.

Delacruz became aware of a person named Jeff who wanted to purchase kilograms of cocaine. 1/24/12 RP 61. Jeff wanted to broker a deal

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<sup>2</sup> Given the defense claim of sufficiency of the evidence, the State presents a detailed summary of the trial testimony.

in Skagit County as it is a hub for dealing. 1/24/12 RP 62. Delacruz was used given his Hispanic descent. 1/24/12 RP 62.

On January 26, 2011, Delacruz spoke with Jeff by phone and represented he was a kilo-level dealer. 1/24/12 RP 62. Delacruz sent Jeff a photograph of drugs. 1/24/12 RP 64. To gain Jeff's confidence, Delacruz had a number of conversations with Jeff until May 20, 2011. 1/24/12 RP 65. Delacruz met with Jeff on February 10, 2011, at a restaurant in Mount Vernon to provide samples. 1/24/12 RP 67, 68. Officers put two kilograms of drugs which had been seized from the border in the back of a car to show to Huynh. 1/24/12 RP 72-3, 92. Jeff said he was coming from Portland and was bringing the person who was actually going to purchase the drugs. 1/24/12 RP 68, 75. Delacruz identified the co-defendant Jeffrey Huynh in court as the person he met with. 1/24/12 RP 67. Officers never identified the other person at that meeting. 1/24/12 RP 91. Delacruz met Huynh outside, and they went inside the restaurant. 1/24/12 RP 75. Delacruz was talking mostly with Huynh, but the other person was sitting across from Delacruz, looking at Delacruz and not saying anything. 1/24/12 RP 76. Huynh asked to see the cocaine. 1/24/12 RP 76. Delacruz asked another officer to bring the drugs by. 1/24/12 RP 76. Huynh and the other man had a conversation in their native Asian language, which Delacruz could not understand. 1/24/12 RP 86, 107. Huynh and Delacruz went outside.

1/24/12 RP 77. Huynh and Delacruz got inside a vehicle and Huynh was shown the two packages of drugs. 1/24/12 RP 77. Huynh took pictures and they spoke about the quality of the cocaine. 1/24/12 RP 77. After they returned inside, Huynh and the other man spoke again, and they told Delacruz they would decide about the purchase in a couple of days. 1/24/12 RP 79-80. After the call, Delacruz complained to Huynh about the way the other person conducted himself during the meeting. 1/24/12 RP 110.

Over the next few months, Delacruz and Huynh had conversations about the drugs about twenty to thirty times and they arranged on prices. 1/24/12 RP 81, 102, 1/25/12 RP 108. Huynh appeared to be working for three different buyers. 1/25/12 RP 150. Huynh wanted a broker's fee as part of the price. 1/24/12 RP 81-2. The drugs they were talking about dealing were of a quality to be cut before being sold to others who would then use or re-sell the drugs. 1/24/12 RP 80, 82. The price for the cheaper of the two packages was \$21,000, with the broker's fee. 1/24/12 RP 81-2, 85-6. The more expensive package was to be sold at \$24,000 with the broker's fee. 1/24/12 RP 85.

Huynh arranged to set up a three kilogram deal in March of 2011, at the Burlington Haggen's store. 1/25/12 RP 108. Huynh had initiated the call, but ended up canceling the delivery. 1/25/12 RP 109. Huynh also sent text messages scheduling the deal. 1/25/12 RP 110. Huynh told Delacruz

the drugs were going to be sent to Canada. 1/25/12 RP 110. On April 15, 2011, Huynh started contacting Delacruz to set up a deal for a certain group. 1/26/12 RP 9. This group was the one that eventually lead up to a deal. 1/26/12 RP 9, 11. Huynh tried to arrange the deal again on April 22<sup>nd</sup> and May 6<sup>th</sup>, but both fell through. 1/25/12 RP 113, 1/26/12 RP 11-12. Huynh texted Delacruz on May 7<sup>th</sup> saying:

Chino got the money squared away, having them send it to me to prove it, and I will send it to you to see, and if you still down, sorry man.

1/26/12 RP 12. Huynh appeared to be arranging the transactions to get the finder's fees in cash and also to get samples. 1/25/12 RP 167-8. On May 17, 2011, Delacruz got a text message from Huynh to arrange a deal for Friday, May 20<sup>th</sup>. 1/26/12 RP 14, 1/25/12 RP 167

On May 20<sup>th</sup>, Huynh contacted Delacruz again between noon and 2:00 and said that he was ready to do the deal. 1/25/12 RP 115. They agreed on a price of \$42,000 for two kilograms plus the \$2,000 fee. 1/25/12 RP 115. Delacruz was not sure it was going to happen until Huynh called back from Seattle indicating he was with the buyer. 1/25/12 RP 116-7. They arranged to meet at the same restaurant. 1/25/12 RP 121. Officer couldn't get DEA agents available so they set up other officers as surveillance. 1/25/12 RP 122. Delacruz wore a body wire. 1/25/12 RP 125. Delacruz parked outside and went in to the restaurant. 1/25/12 RP 125.

Huynh and two other individuals were sitting at a table next to the bar.  
1/25/12 RP

Agent Delacruz identified Raymond Mak, one of the defendant's sitting in court, as one of the other individuals he met on May 20, 2011. 1/24/12 RP 83, 126. The other individual was Mr. Lin. 1/25/12 RP 126.<sup>3</sup> Huynh took Delacruz outside to talk. 1/25/12 RP 126. Huynh told Delacruz he was getting \$2,000 for each kilogram. 1/25/12 RP 127. Huynh also talked about future transactions. 1/25/12 RP 127. Huynh wanted to use the term BMW for one kilogram, Cadillac for two kilograms, and use east coast times for meetings. 1/25/12 RP 127. Huynh indicated future buys would be three to five kilograms per week, every other week. 1/25/12 RP 127. Delacruz and Huynh went back inside with the other two men. 1/25/12 RP 128. At the table, Delacruz spoke with both Mak and Huynh. 1/25/12 RP 129. During the conversation, it appeared to Delacruz that Huynh had not told Mak about the sample that Huynh was asking for because Mak did not know about the sample. 1/25/12 RP 156. Delacruz said he wasn't going to show them anything until they showed him the money. 1/25/12 RP 129. Huynh and Mak went to the bathroom. 1/25/12 RP 129. Huynh then called Delacruz telling him to come to the bathroom. 1/25/12 RP 130. Mak was in

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<sup>3</sup> Agent Delacruz later found out that Lin and Mak were Chinese and Huynh was Vietnamese. 1/26/12 RP 20

the bathroom with Huynh, when Huynh pulled up his jacket sleeve and showed Delacruz bundles of \$100 bills stacked together. 1/25/12 RP 130. Photographs of the money bundled in amounts easier to count were admitted at trial. 1/25/12 RP 130-2. Mak wanted to see the cocaine. 1/25/12 RP 132-3. At that point, Delacruz had just Mak accompany him outside the restaurant and took him to the vehicle in which the cocaine was stored. 1/25/12 RP 134. Delacruz opened the trunk and Mak opened the bag, reached in and grabbed the kilo on top and looked at it. 1/25/12 RP 134. Delacruz also showed Mak the sample. 1/25/12 RP 134.

During the walk to the vehicle and the walk back inside, Mak and Delacruz talked about Mak wanting to buy more. 1/25/12 RP 135. Outside Mak pointed to his car, a BMW, which was parked in the lot in the first stall. 1/25/12 RP 136. They walked back inside the restaurant. 1/25/12 RP 136. They agreed to do the deal. 1/25/12 RP 140. Delacruz tried to get Huynh not to be present but Huynh insisted on being there. 1/25/12 RP 141.

They exited the restaurant to Delacruz's vehicle with Huynh as the front passenger and Mak seated behind Delacruz. 1/25/12 RP 141-2. Huynh brought out the jacket with the money. 1/25/12 RP 142. Delacruz drove around the lot to the back. 1/25/12 RP 142-3. Mak said he wanted his cocaine and they again showed Delacruz the money offering him to count it. 1/25/12 RP 143. Delacruz said he would not. 1/25/12 RP 143. Delacruz

told Mak he would pop the trunk so Mak could grab the cocaine and go. 1/25/12 RP 143. Huynh handed Delacruz the money. 1/25/12 RP 144. Delacruz popped the trunk, and Mak got out. 1/25/12 RP 143. Mak took the bag with cocaine, closed the trunk and walked away. 1/25/12 RP 144, 186. Huynh told Delacruz he wanted the \$2,000, so Delacruz took \$2,000 from the bundle and counted it out to Huynh to get him to leave. 1/25/12 RP 144. Once Huynh left, Delacruz saw Mak walking north. 1/25/12 RP 144. Delacruz then saw Mak in his BMW exiting the restaurant. 1/25/12 RP 144. Delacruz saw a commotion behind him believing Lin and Huynh had been arrested but Mak was getting away. 1/25/12 RP 144. Delacruz notified two officers who pulled over Mak. 1/25/12 RP 144. Delacruz and Detective Dave Floyd later counted out the money and determined there was \$42,000 and the commission of \$2,000 given to Huynh. 1/25/12 RP 146. Delacruz also saw the bag which had been in his car in the back of Mak's car after Mak was stopped and the trunk to his vehicle opened. 1/25/12 RP 186, 188.

Agent Samuel Rodriguez was a border patrol agent who was also detailed to work for the drug enforcement agency as an undercover officer. 1/24/12 RP 121. On February 10, 2011, Rodriguez assisted in the operation to show a buyer two kilograms of drugs. 1/24/12 RP 124-5. Rodriguez was the driver who dropped off Delacruz and brought the drugs to the back of the building to show the buyer. 1/24/12 RP 124-6.

Agent Jason Webber was a drug enforcement agency investigator in from the Bellingham office who worked in the Whatcom and Skagit County areas. 1/24/12 RP 137-8. Webber had checked subscriber information for a pre-paid phone number and it returned to a Jeffrey Huynh. 1/24/12 RP 141. Webber learned of a Portland address and photograph for Huynh from the Oregon Department of Licensing. 1/24/12 RP 141-2, 152. On February 10, 2011, Webber worked surveillance and saw a tan Toyota vehicle pull into the parking lot and the occupants meet with Delacruz. 1/24/12 RP 142, 153. After the viewing, Webber assisted in following the vehicle on Interstate 5 and Interstate 405, all the way towards Renton. 1/24/12 RP 144. In the Renton area, the vehicle did evasive driving maneuvers including a U-turn suggesting the vehicle was engaging in counter-surveillance to determine if it was being followed. 1/24/12 RP 145, 156. Surveillance was lost in the Renton area. 1/24/12 RP 156.

Agent Belanger was a Washington State Patrol Detective working with the Drug Enforcement Agency, who assisted in surveillance on February 10, 2011. 1/25/12 RP 3, 6. Belanger had a residence location for Jeffrey Huynh in Oregon and had surveillance set up to identify when he left Portland. 1/25/12 RP 7-8. Surveillance lost track of the vehicle when it left the interstate from Portland. 1/25/12 RP 8. Belanger saw the Camry driven by Huynh as it approached the restaurant from the freeway. 1/25/12 RP 9-

10. Belanger maintained surveillance until the vehicle with Huynh and an Asian male passenger left the restaurant. 1/25/12 RP 11-4.

Belanger also testified about his experience with dealings in kilograms of cocaine. 1/25/12 RP 15. He testified that it is standard to charge a commission of about \$500, but that it can go up to \$2,000. 1/25/12 RP 15. Belanger testified that the stamps on the cocaine shown to Huynh, show the region or organization where it was produced. 1/25/12 RP 16-7. The stamps are similar to a brand. 1/25/12 RP 17-8. Belanger testified that a kilogram of cocaine with purity above 80 percent is considered pure. 1/25/12 RP 19. As the cocaine moves along the distribution chain the purity is reduced as the cocaine is reprocessed or manufactured by cutting with other powdered products down to a purity of 5 to 15 percent for users. 1/25/12 RP 18-21, 28. Belanger testified that Skagit County is a hub for dealing and a kilogram worth \$21,000, in Skagit County would be worth \$30,000 to \$45,000 in Canada. 1/25/12 RP 25. Belanger testified that ounces of cocaine are usually sold locally for \$700 to \$800. 1/25/12 RP 27. Belanger calculated the weight and cutting of the two kilograms to be sold two to three times to determine a weight at the ounce level. 1/25/12 RP 29-30. At the ounce level, the value would be \$56,400 at \$800 an ounce and \$49,350 at \$700 an ounce. 1/25/12 RP 30. If stepped on again, the two kilograms would be valued at \$112,800, to \$98,700 based upon local price.

1/25/12 RP 30-1. The kilogram represented enough for 8,000 doses for users. 1/25/12 RP 32.

Detective Dave Floyd of the Skagit County Interlocal Drug Enforcement Unit testified being an undercover officer who assisted in the viewing arranged for February 10, 2011. 1/25/12 RP 91-3. Floyd assisted Delacruz in arranging the two kilograms of cocaine to be viewed. 1/25/12 RP 93-4. Floyd also provided surveillance monitoring a body wire worn by Delacruz. 1/25/12 RP 95-6. Floyd testified the discussion on the wire dealt a lot with prices and future quantities. 1/25/12 RP 99. Floyd heard Huynh ask to take a picture. 1/25/12 RP 99.

Floyd also was involved as the case agent and a cover officer on the transaction on May 20, 2011. 1/26/12 RP 129-30. Delacruz was again wearing a body wire which Floyd monitored. 1/26/12 RP 133-4. After Delacruz had gone into the restaurant, he came out with Huynh. 1/26/12 RP 134-5. Floyd could hear the conversation regarding amounts, vehicles corresponding to amounts and using the east coast time zone. 1/26/12 RP 135. Floyd saw Delacruz go outside with Mak and observe the trunk open on the undercover vehicle. 1/26/12 RP 136-7. After they walked away, Floyd heard a conversation about Mak making a phone call and the potential for future transactions. 1/26/12 RP 138. Once back inside, Floyd overheard Delacruz telling them he wasn't going to do the transaction in a public place.

1/26/12 RP 139. Delacruz and the other two exited the restaurant and went to the undercover vehicle which drove around to the back side of the restaurant. 1/26/12 RP 139-40. Floyd heard a discussion regarding the money and observed Mak exit the vehicle, remove something from the trunk and walk away. 1/26/12 RP 141. Once Delacruz finished counting the money to Huynh, he gave the arrest signal to Floyd. 1/26/12 RP 142. Mak had already begun to back out of the parking lot and drive away. 1/26/12 RP 142. Floyd coordinated units to contact both vehicles. 1/26/12 RP 142.

Floyd was present when the search warrant was served on Mak's vehicle and took photographs which were admitted. 1/26/12 RP 143-4. Floyd identified the documents of dominion and control of the BMW showing it belonged to Mak. 1/26/12 RP 177-9. The documents from the vehicle showed that Mak was maintaining the vehicle and he was one of two registered owners. 1/26/12 RP 179-80. One document showed the vehicle was shipped by Mak from Texas to Renton in the end of January, 2011. 1/26/12 RP 188. Four phones related to Mak and his vehicle. 1/26/12 RP 183-4, 21. Lin and Huynh each had a phone. 1/26/12 RP 184. Floyd testified that it was common for dealers to have separate phones for dealing and personal use. 1/26/12 RP 18. There were also prepaid calling cards located in the BMW. 1/26/12 RP 18-9. A search warrant of the Honda revealed an expandable baton similar to a law enforcement baton and that the

vehicle belonged to Lin in the Seattle area. 1/26/12 RP 184. Shears with suspected marijuana residue were located in Lin's vehicle. 1/26/12 RP 191. Also located was a \$6,000 withdrawal slip from a Bank of America account on May 18, 2011. 1/26/12 RP 4-5. Floyd had also arranged for air cover for the transaction, and had observed the video footage obtained. 1/26/12 RP 165-6. The video was admitted. 1/26/12 RP 168.

Jennifer Hinckley was an agent with the Department of Homeland Security who assisted with surveillance on the transaction on May 20, 2011. 1/26/12 RP 27, 44. Hinckly was called in late on that Friday to assist. 1/26/12 RP 28. The targets of the investigation arrived first, which was not ideal. 1/26/12 RP 28-9. As a result, officers did not know in which vehicles they arrived. 1/26/12 RP 29. Officers did not see the vehicle Huynh had arrived in previously in the parking lot. 1/26/12 RP 29.

Hinckley saw Agent Delacruz go inside and exit with Mak about fifteen to twenty minutes later. 1/26/12 RP 31. Hinckley saw them walk in the direction of Delacruz's car. 1/26/12 RP 31. They returned a short time later and had a three to five minute conversation directly in front of Hinckley's car. 1/26/12 RP 32. Mak used his phone and appeared to have a conversation before they went inside. 1/26/12 RP 33. About five minutes later, Delacruz, Mak and Huynh left the restaurant going back to the

undercover car. 1/26/12 RP 33-4. Another person was outside smoking and appeared to be doing counter-surveillance. 1/26/12 RP 35-6.

Hinckley then saw Mak leave the area where the undercover vehicle had been carrying a jacket over his arm with something underneath. 1/26/12 RP 37. Mak went to the back of his greenish-black BMW, opened his trunk and put something inside. 1/26/12 RP 37, 40. Mak appeared to gesture to the man smoking outside. 1/26/12 RP 38. Huynh then came back around the front of the building as Mak began to drive away. 1/26/12 RP 38. Huynh went to a green Honda Civic two positions south and got inside with the man who had been outside smoking. 1/26/12 RP 38-9. Hinckley saw the arrest team arrive and pointed them toward Huynh and the man who was smoking. 1/26/12 RP 40-1, 55.

Detective Ben Hagglund of the Skagit County Sheriff's Office assisted in the transaction on May 20, 2011, as part of the arrest team. 1/26/12 RP 57-8. Hagglund was partnered with Detective Meyer of the Sheriff's Office. 1/26/12 RP 58. Hagglund monitored radio traffic and when he got word, he went to arrest Huynh. 1/26/12 RP 60-1. Huynh was at the passenger side of a vehicle and Meyer arrested Lin. 1/26/12 RP 62. Hagglund searched Huynh on arrest and took a of wad cash off his person which was taken as evidence. 1/26/12 RP 63-4, 68

Detective Tobin Meyer testified about assisting the arrest team on May 20, 2011. 1/26/12 RP 70-1. Meyer was with Hagglund and the monitored radio traffic. 1/26/12 RP 71-2. Meyer was directed toward a vehicle by other agents and contacted Jaiyin Lin at the driver's side of a vehicle. 1/26/12 RP 73. Meyer also gathered the money totaling about \$2,000 taken by Hagglund off the passenger Huynh and provided that to Detective Neufeld. 1/26/12 RP 74-5.

Officer Dustin Richardson was a Mount Vernon Police Officer who assisted the arrest team on May 20, 2011. 1/26/12 RP 78-9. Richardson was in uniform in a marked patrol vehicle with another officer. 1/26/12 RP 80. As Richardson arrived at the restaurant to assist in the arrest, he was directed to a 2002 BMW 530 which had left. 1/26/12 RP 80, 89. Richardson was told the vehicle left with the cocaine inside and was told the direction the vehicle went. 1/26/12 RP 80-1. Richardson stopped the vehicle a few blocks away with lights and siren. 1/26/12 RP 81-2. Richardson had Mak step out of the vehicle and arrested him. 1/26/12 RP 83. Mak was the only one in the vehicle. 1/26/12 RP 91.

Duane Neufeld was a deputy with the Skagit County Sheriff's Office assigned to the Skagit County Interlocal Drug Enforcement Unit. 1/26/12 RP 92-3. Neufeld was an undercover officer who was assigned to surveillance on May 20, 2011. 1/26/12 RP 93, 95. Neufeld was assigned to

keep watch on the drugs and the vehicle in which they were stored. 1/26/12 RP 96. Neufeld saw Huynh and Delacruz exit the restaurant for a short time and talk. 1/26/12 RP 98. Neufeld also saw Delacruz go out and open the trunk of the car showing the contents to Mak. 1/26/12 RP 99. He then saw Huynh and Mak come out and go to the undercover vehicle. 1/26/12 RP 100. They drove the vehicle to a different location. 1/26/12 RP 100. Neufeld got word the BMW left the parking lot. 1/26/12 RP 101. Neufeld heard the vehicle was stopped by marked police cars at an intersection nearby. 1/26/12 RP 102-3. Neufeld first drove around watching the area to see if there were other people who had been involved. 1/26/12 RP 103. He then went to the location of the traffic stop and took control of the vehicle. 1/26/12 RP 103-4. He arranged for the vehicle to be transported to the Mount Vernon Police Department to conduct a search. 1/26/12 RP 104. The bags of cocaine were located in the trunk along with a dark-colored coat. 1/26/12 RP 106-8. During the search of the vehicle, Neufeld collected two cell phones and documents showing the car belonged to Mak. 1/26/12 RP 109, 115-7, 177. During a search of the vehicle, there was a positive alert by a trained drug dog. 1/26/12 RP 122. Neufeld identified a video of the transaction taken from an aircraft arranged through Homeland Security Investigations. 1/26/12 RP 110-1.

Karen Finney a forensic scientist of the Washington State Patrol Crime Laboratory testified she performed an analysis of the three packages sold and found them to contain cocaine. 1/26/12 RP 152, 156, 158. Finney testified the gross weight on the two larger packages was 1,055 grams and 1,059 grams. 1/26/12 RP 159. The smaller Ziploc package contained 28.10 grams. 1/26/12 RP 159.

**ii. Jury Instructions**

As to the charge of possession with intent to manufacture or deliver a controlled substance the jury was instructed as to the elements of the offense as follows:

To convict the defendant, JEFFREY T. HUYNH, of the crime of possession with intent to manufacture or deliver a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 20, 2011, the defendant, JEFFREY T. HUYNH, or an accomplice, possessed a controlled substance – Cocaine;
- (2) That the defendant, JEFFREY T. HUYNH, or an accomplice, possessed the substance with the intent to manufacture or deliver a controlled substance – Cocaine, and
- (3) That this act occurred in the State of Washington.

CP 43 (Instruction No. 12). Manufacturing was also defined for the jury.

Manufacture means the direct or indirect production, preparation, compounding, conversion or processing of any controlled substance.

Manufacture also means the packaging or repackaging of any controlled substance or labeling or relabeling of the controlled substance's container.

CP 47 (Instruction No. 15). Delivery was defined.

Deliver or delivery means the actual or constructive or attempted transfer of a controlled substance from one person to another.

CP 48 (Instruction No. 17). Since the instruction on the elements of possession with intent for Huynh alleged his involvement as an accomplice, the jury was given an accomplice instruction.

A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable. A person is legally accountable for the conduct of another person when he or she is an accomplice of such other person in the commission of the crime.

A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

(1) solicits, commands, encourages, or requests another person to commit the crime;

or

(2) aids or agrees to aid another person in planning or committing the crime.

The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.

A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.

CP 39 (Instruction No. 8).

On the charge of conspiracy to commit possession with intent to manufacture or deliver the instruction contained the following elements for the State to prove.

To convict the defendant, JEFFREY T. HUYNH, of the crime of possession with intent to manufacture or deliver a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 20, 2011, the defendant, agreed with one or more persons other than the undercover agent, to engage in or cause the performance of conduct constituting the crime of possession with intent to manufacture or deliver a controlled substance;
- (2) That the defendant made the agreement with the intent that such conduct be performed;
- (3) That any one of the persons involved in the agreement took a substantial step in pursuance of the agreement, and
- (4) That any of these acts occurred in the State of Washington.

CP 51 (Instruction No. 20).

The jury was also given the direction to complete the special verdict forms to determine whether the offenses were a major violation of the Uniform Controlled Substances Act if Huynh was convicted. CP 55, 57 (Instruction Nos. 24, 26). The court defined a major violation of the uniform controlled substances act.

A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of the following factors may identify the offense charged in Count 1 as a major trafficking violation.

Whether the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use.

Whether the circumstances of the offense reveal that the defendant occupied a high position in the drug distribution hierarchy; or

Whether the offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of distribution.

CP 58 (Instruction No. 27). See also CP 59 (Instruction No. 28 applying to count 2). The jury answered “yes” to the special verdict form to the question asking whether the offenses were a major violation of the uniform controlled substances act. CP 83, 84.

### **iii. Motion to Sever**

Prior to trial Huynh moved to sever his case from the co-defendant, Raymond Mak contending Mak made statements implicating Huynh. CP 166-7. The written motion also sought severance of counts. CP 167-9. Huynh’s primary argument regarding severance of defendants was that co-defendant statements implicated him. CP 171. Huynh contended that Mak’s statements could not be adequately redacted to eliminate prejudice. CP 171. When the motion to sever was heard, the prosecutor offered the redactions that had been agreed to by prior defense counsel and additional redactions proposed by Huynh’s new counsel. 1/4/12 RP 21-2. The trial court opined the redactions appeared adequate. 1/4/12 RP 23. But Huynh’s new counsel

sought to continue the hearing to a later date. 1/4/12 RP 24. At the subsequent hearing, Huynh's counsel contended that no amount of redaction of references by Mak to Huynh would be adequate and that counsel would "stand on my motion." 1/13/12 RP 74-5. The court denied severance.

This deletion from Mr. Mak's statement removes any references to Mr. Huynh and no longer implicates Mr. Huynh in any way and can be admitted against Mr. Mak to show Mr. Mak's involvement in the transaction.

1/13/12 RP 75.

At trial, Huynh renewed the motion to sever without significant argument only noting that it was "incumbent upon the defense attorney to raise severance repeatedly." 1/23/12 RP 39. During the testimony Huynh contended severance was merited because the defenses were "diametrically divergent." 1/25/12 RP 86. The trial court denied the motion.

The two defendants may be pointing fingers at one another, but that doesn't mean the case doesn't get tried together. I don't hear any defenses that are the type of defenses or type of conflicts or inconsistencies that should result in an order to sever.

1/25/13 RP 86. Following presentation of evidence, Huynh again moved to sever contending defenses were "divergent, inconsistent and unable to go forward in the same trial." 1/27/12 RP 46. The trial court again denied the motion. 1/27/12 RP 47.

#### IV. ARGUMENT

##### 1. Possession with intent to manufacture or deliver is not an alternative means crime.

The Washington State Supreme Court has provided a test to examine whether a statute describes a single offense which may be committed in more than one way or multiple offenses. They are the Arndt factors.<sup>4</sup>

When the statute does not clearly answer this question upon its face, and there is need for interpretation, several tests are available.

(I)n determining the question, there may be many factors that will aid the court, such as (1) the title of the act; (2) whether there is a readily perceivable connection between the various acts set forth; (3) whether the acts are consistent with and not repugnant to each other; (4) and whether the acts may inhere in the same transaction.

State v. Arndt, 87 Wn.2d 374, 378-79, 553 P.2d 1328 (1976), *citing* State v. Kosanke, 23 Wn.2d 211, 213, 160 P.2d 541, 542 (1945).

The Legislature defined three crimes in RCW 69.50.401: “it is unlawful for any person to [1] manufacture, [2] deliver, or [3] possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1) (numbers added). The jury convicted defendant Huynh of the third crime, possession with intent to manufacture or deliver. Huynh now argues the

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<sup>4</sup> Although initially originating in State v. Kosanke, the Supreme Court termed them Arndt factors in In Re Pers. Restraint Petition of Jeffries, 110 Wn.2d 326, 336, 752 P.2d 1338 (1988).

Legislature defined alternative means for this third crime, possession with intent to manufacture or possession with intent to deliver.

Applying the Arndt factors, the State contends the manufacture or deliver are within the same statute, are connected by the criminal element of possession with intent, are consistent with one another and inhere in the same transaction.

Defendant's alternative means argument regarding alternative means fails for three reasons. First, the Legislature intended to create one crime phrased in the disjunctive – possession with intent to manufacture or deliver. That alone does not create alternative means. “[A] defendant may not simply point to an instruction or statute that is phrased in the disjunctive in order to trigger a substantial evidence review of her conviction.” State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

Second, the possession statute does not resemble the other criminal statutes that create alternative means for proving a crime.

Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. Criminal assault is just such a crime.

State v. Smith, 159 Wn.2d at 784. Unlike the assault statute, RCW 69.50.401 lists three separate crimes and does not give more than one means that a person can commit the offense within any one of those three crimes.

The assault statute provides multiple alternative means which are inconsistent with one another.

The legislature has codified four degrees of criminal assault. Between the crimes of first, second, and third degree assault, the legislature has delineated a total of 17 alternative means of commission. See RCW 9A.36.011-.031. As promulgated by the legislature, the second degree criminal assault statute articulates a single criminal offense and then provides six separate subsections by which the offense may be committed. RCW 9A.36.021(1)(a)-(f).

State v. Smith, 159 Wn.2d at 784(2007).

Third, no Washington court has held that possession with intent to manufacture or deliver states alternative means. Defendant relies on standards from cases involving rape and assault. Brief of Appellant at pages 8-9<sup>5</sup>. These statutes, though, fit the pattern described by the Supreme Court in Smith: a general crime followed by subsections defining how to commit the crime. State v. Smith, 159 Wn.2d at 784-85. No support exists for declaring possession with intent to manufacture or deliver an alternative means crime.

In Re Pers. Restraint Petition of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988) the Court held that a jury was not required to unanimously

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<sup>5</sup> State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007) (assault in the second degree), State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994) (rape in the second degree), State v. Kitchen, 110 Wn.2d 403, 756 P.2d 105 (1988) (statutory rape).

agree as to alternative facts satisfying each alternative aggravating circumstance that could constitute aggravated murder in the first degree. The Court stated that Jeffries' “ ‘means within means’ argument raises the spectre of a myriad of instructions and verdict forms whenever a criminal statute contains several instances of use of the word ‘or’.... Petitioner cites no authority for his position and we perceive no necessity for it.” In Re Pers. Restraint Petition of Jeffries, 110 Wn.2d at 339-40.

In addition, contrary to Huynh’s assertion, there was sufficient evidence from which a jury could infer Huynh participated with Mak as an accomplice in the intent to manufacture as that crime is defined.

**2. There was sufficient evidence of possession with intent to manufacture as manufacturing is defined by law.**

Huynh’s argument seeking reversal of the conviction for possession with intent to manufacture or deliver also fails because there was sufficient evidence from which the jury could infer he was an accomplice to the intended manufacture or delivery by Mak. However, even assuming that the offense involves alternative means, there was sufficient evidence from which the jury could infer the intent to manufacture.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State

v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth 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, 1074 (1992); State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. State v. Ortega-Martinez, 124 Wn.2d 702, 707-8, 881 P.2d 231 (1994).

Huynh contends that there was insufficient evidence presented to the jury that he was an accomplice to the possession with intent to deliver or manufacture by Mak. Brief of Appellant at page 11. In support, he argues that he was simply the broker trying to earn a fee. *Id.* The State contends

this argument improperly draws inferences in favor of the defendant in violation of the proper analysis of sufficiency of the evidence.

Reviewing sufficiency of the evidence all reasonable inferences in favor of the verdict and interpret them “most strongly against the defendant.” State v. Zunker, 112 Wn. App. 130, 135, 48 P.3d 344 (2002) (citing State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995)), *rev. denied*, 148 Wn.2d 1012 (2003). “Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Huynh’s arguments also fail to recognize the significant evidence of the intended future manufacturing, including repackaging of the drugs, which lends value to Huynh’s role in the transaction to maximize his fees.

Manufacturing had a specific definition which was provided to the jury which provided a description of what amounts to manufacturing.

Manufacture means the direct or indirect production, preparation, compounding, conversion or processing of any controlled substance.

Manufacture also means the packaging or repackaging of any controlled substance or labeling or relabeling of the controlled substance’s container.

CP 47 (Instruction No. 15). Under the instruction, any processing of the drugs or packaging or labeling would amount to manufacturing. A jury could reasonably infer that because the purpose in purchasing large

quantities of drugs is to make a profit and that profit is achieved by maximizing the quantity and price of the drugs, that Mak intended to process or package the drugs.

Agent Belanger testified in detail about the manner and prices related to cocaine trafficking. The stamps on the cocaine shown to Huynh, show the region or organization where it was produced. 1/25/12 RP 16-7. The stamps are similar to a brand. 1/25/12 RP 17-8. A kilogram of cocaine with a purity above 80 percent is considered pure. 1/25/12 RP 19. As the cocaine moves along the distribution chain the purity is reduced as the cocaine is reprocessed or manufactured by cutting with other powdered products down to a purity of 5 to 15 percent for users. 1/25/12 RP 18-21, 28. Skagit County, a hub for dealing, is where a kilogram of cocaine is worth \$21,000. 1/25/12 RP 25. Ounces of cocaine are usually sold locally for \$700 to \$800. 1/25/12 RP 27. Belanger calculated the weight and cutting of the two kilograms to be sold two to three times to determine a weight at the ounce level. 1/25/12 RP 29-30. At the ounce level, the value would be \$56,400 at \$800 an ounce and \$49,350 at \$700 an ounce. 1/25/12 RP 30. If “stepped on” again, the two kilograms would be valued at \$112,800, to \$98,700 based upon local price. 1/25/12 RP 30-1. The kilogram represented enough for 8,000 doses for users. 1/25/12 RP 32. As testified to by Agent Delacruz, the drugs they were dealing were of a quality to be cut before being sold to

others who would then use or re-sell the drugs and that pretty much everyone who touches it “steps on it.” 1/24/12 RP 80, 82.

The jury could reasonably infer Mak had the intent to process or package the drug for further sales and that Huynh was an accomplice by assisting in obtaining the drugs for that purpose.

Viewing the evidence in favor of the State, there was sufficient evidence that Huynh was an accomplice to Mak’s possession with intent to manufacture. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

**3. The aggravating factor defining a major violation of the uniform controlled substances act is definitional and does not establish a separate means.**

Huynh makes a similar argument as to alternative means for the aggravating factor for a major violation of the uniform controlled substances act. Brief of Appellant at page 13-15. Huynh contends the aggravating factors contained alternative means requiring to present evidence of all circumstances. Brief of Appellant at page 14.

The State contends the aggravating circumstance instruction was a definitional, provided factors for the jury to consider and there was evidence supporting each factor.

The aggravating factor definition read as follows:

A major trafficking violation of the Uniform Controlled Substances Act is one which is more onerous than the typical offense. The presence of the following factors

may identify the offense charged in Count 1 as a major trafficking violation.

Whether the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use.

Whether the circumstances of the offense reveal that the defendant occupied a high position in the drug distribution hierarchy; or

Whether the offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of distribution.

CP 58 (Instruction No. 27). See also CP 59 (Instruction No. 28 for count 2).

**i. The instruction describing a major violation of the uniform controlled substances act is definitional.**

Huynh has presented no cases addressing whether aggravating circumstances for exceptional sentence carries the same analysis as alternative means for elements of offense. The State has found none. However, the State contends this court can look to the analysis of aggravating circumstances for murder in the first degree as analyzed in In Re Pers. Restraint Petition of Jeffries, 110 Wn.2d 326, 752 P.2d 1338 (1988) and other cases where trial court has evaluated whether the instructions were definitions to determine whether in this case the exceptional factors for a major violation of the uniform controlled substances act are definitional.

In Jefferies, the petitioner contended the evidence did not support all the alternative means supporting the aggravating circumstances used to

impose the death penalty. In Re Pers. Restraint Petition of Jeffries, 110 Wn.2d at 336. The jury was given aggravating circumstances of a murder to conceal the commission of a crime or protect the identity of someone committing a crime and more than one victim part of a common scheme or plan. In Re Pers. Restraint Petition of Jeffries, 110 Wn.2d at 337. The petitioner contended the jury had to agree to the alternative ways to satisfy each of the alternative aggravating circumstance. The Supreme Court rejected the “means within means” argument. In Re Pers. Restraint Petition of Jeffries, 110 Wn.2d at 339-40.

In State v. Strohm, 75 Wn. App. 301, 879 P.2d 962 (1994), a case involving trafficking in stolen property, the jury was given instructions defining the offense which Strohm contended provided alternative means.

The definition of “traffic” in the definition section of the statute does not add to the criminal statute; its only purpose is to provide understanding. **Thus, we conclude that definition statutes do not create additional alternative means,** “means within means,” of committing an offense. By defining “traffic” the Legislature was not creating additional alternative means, but merely defining the traffics alternative means of “Trafficking in stolen property” under RCW 9A.82.050(2). The various ways a person can “traffic” under RCW 9A.82.010(10) are merely factual circumstances which support the traffics alternative under RCW 9A.82.050(2).

State v. Strohm, 75 Wn. App. 301, 309, 879 P.2d 962 (1994).

In State v. Laico, 97 Wn. App. 759, 987 P.2d 638 (1999), the jury was given the statutory definition of great bodily harm. The defendant

argued the three alternative definitions of great bodily harm created three alternative means for committing the offense. The Court rejected the claim finding the instruction was a definition that did not add elements to the offense and was intended to provide understanding . State v. Laico, 97 Wn. App. at 763-4.

Here there were three factors presented in the instruction. They can be shortened to be characterized as substantially larger than for personal use, high position in drug distribution hierarchy, or high degree of sophistication or planning. These are the same type of definitional instructions as described in Strohm and Laico. They were presented to the jury as “factors” and provide understanding as to what constitutes major violation of the uniform controlled substances act.

The case cited by Huynh does not provide meaningful analysis for this court. Brief of Appellant at page 15. State v. Kinchen, 92 Wn. App. 442, 963 P.2d 928 (1998) involved a case where the prosecutor asked the jury to convict a defendant of unlawful imprisonment for locking his children in the bathroom or for actions of keeping them in the apartment. State v. Kinchen, 92 Wn. App. at 451. Because the appellate court found leaving the children in the apartment as insufficient to show they were restrained at that time. State v. Kinchen, 92 Wn. App. at 452. Therefore, the jury could have convicted upon a basis for which evidence would not

support conviction. Thus, Kinchen is not an alternative means offense and does not provide meaningful analysis.

**ii. There was evidence supporting each of the factors for a major violation of the uniform controlled substances act.**

Whether the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use....

CP 58 (Instruction No. 27). Huynh concedes there was significant evidence of quantities substantially larger than for personal use. Brief of Appellant at page 14. Huynh contends there was insufficient evidence for the other two factors.

Whether the circumstances of the offense reveal that the defendant occupied a high position in the drug distribution hierarchy; or

Whether the offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of distribution.

CP 58 (Instruction No. 27). Huynh draws negative inferences in violation of the requirement that all inferences be drawn in favor of the State in a sufficiency of the evidence claim. He characterizes the situation was no evidence about Huynh's involvement in the drug hierarchy and the deal was hastily arranged and Huynh portrayed as unsophisticated. Brief of Appellant at page 14.

Agent Delacruz who arranged the deal testified about his dealings with Huynh. Huynh had worked on arranging the sale of drugs from January

through May of 2011, to arrange deals for kilo purchases of cocaine. 1/24/12 RP 62, 65. Huynh appeared to work for at least three different buyers to attempt to arrange the transaction. 1/24/12 RP 150, 1/26/12 RP 15. Huynh was the broker for the deals. 1/25/12 RP 150. He tried to arrange a deal in March for three kilograms for \$66,000. 1/25/12 RP 152. He traveled twice from Oregon to Mount Vernon to arrange the deal. 1/24/12 RP 68, 75, 1/25/12 RP 7-8. The drugs were planned to be sold in Canada. 1/25/12 RP 110. Huynh and the undercover detective had twenty to thirty conversations about the deal. 1/24/12 RP 81, 102, 1/25/12 RP 108. The quality of the drugs meant that they had to be cut prior to being sold to others. 1/24/12 RP 80, 82. The two kilograms purchased cost \$42,000 with the \$2,000 broker fee for to Huynh. 1/25/12 RP 115, 127, 144, 146. Huynh planned to arrange future buys of three to five kilograms per week every other week. 1/25/12 RP 127.

In addition, as stated above Agent Belanger testified as an expert in the dealing of drugs. He testified that it is standard to charge a commission of about \$500, but that it can go up to \$2,000. 1/25/12 RP 15. The stamps on the cocaine shown to Huynh, are like a brand which show the region or organization where it was produced. 1/25/12 RP 16-8. A kilogram of cocaine with purity above 80 percent is considered pure. 1/25/12 RP 19. As the cocaine moves along the distribution chain the purity is reduced as the

cocaine is reprocessed or manufactured by cutting with other powdered products down to a purity of 5 to 15 percent for users. 1/25/12 RP 18-21, 28. Skagit County is a hub for dealing and a kilogram worth \$21,000, in Skagit County would be worth \$30,000 to \$45,000 in Canada. 1/25/12 RP 25. The detective calculated the weight and cutting of the two kilograms to be sold two to three times to determine a weight at the ounce level. 1/25/12 RP 29-30. At the ounce level, the value would be \$56,400 at \$800 an ounce and \$49,350 at \$700 an ounce. 1/25/12 RP 30. If stepped on again, the two kilograms would be valued at \$112,800, to \$98,700 based upon local price. 1/25/12 RP 30-1. Each kilogram represented enough for 8,000 doses for users. 1/25/12 RP 32.

Given this evidence, a rational trier of fact could readily have determined that Huynh occupied a high position in the drug distribution hierarchy and the offense involved significant sophistication and planning, occurred over a lengthy period of time, and involved a broad geographic area.

**4. Where the defenses to the counts or between co-defendants were not antagonistic, the trial court did not abuse its discretion in denial of severance.**

On appeal, Huynh asserts that trial court abused its discretion in denying severance both of the counts and from the co-defendant. Brief of

Appellant at page 18. The State contends Huynh has not established an abuse of discretion or that he was prejudiced thereby.

A trial court has broad discretion to grant a severance when it is deemed appropriate or necessary “to promote a fair determination of the guilt or innocence of a defendant.” CrR 4.4(c)(2)(i). The burden is on the defendant to come forward with sufficient facts to warrant the exercise of discretion in his or her favor. State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991); State v. Grisby, 97 Wn.2d 493, 507, 647 P.2d 6 (1982). We do not disturb a trial court's decision to grant or deny a severance absent a manifest abuse of discretion. Hoffman, 116 Wn.2d at 74, 804 P.2d 577.

Separate trials are disfavored in Washington. State v. George, 150 Wn. App. 110, 206 P.3d 697 (2009). **“Mutually antagonistic defenses may on occasion be sufficient to support a motion for severance,” but they are not per se prejudicial as a matter of law.** Grisby, 97 Wn.2d at 508, 647 P.2d 6. A defendant seeking severance based on conflicting defenses **must demonstrate “ ‘that the conflict is so prejudicial that defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both [defendants] are guilty.’ ”** Id. (quoting United States v. Davis, 623 F.2d 188, 194–95 (1st Cir.1980)). “[T]o support a finding that the trial court abused its discretion, the defendant must be able to point to specific prejudice.” Id. at 507, 647 P.2d 6.

State v. Emery, 174 Wn.2d 741, 752, 278 P.3d 653 (2012) (emphasis added).

- i. Where the offenses of relating to delivery and conspiracy were a function of the same transaction, the trial court did not abuse its discretion in denial of severance.**

He contends there was a difference for his defenses in the two charged counts with one count being affected because he was an accomplice and the other based upon his own conduct. Brief of Appellant at page 18.

He contends as a result the different theories likely confused the jury and invited the jury to infer guilt on both offenses. Brief of Appellant at page 18.

The State contends the charges here are of a nature that make them connected such that severance is not appropriate. The Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance were alleged to have occurred on or about the same date. Any jury would be evaluating the connection between the parties in evaluating the conspiracy. The offenses are so connected that severance was properly denied.

**ii. Where the co-defendant statements inculcating the defendant were redacted, the trial court did not abuse its discretion in denial of severance.**

In State v. Emery, 174 Wn.2d 741, 278 P.3d 653, 660 (2012) the Supreme Court addressed the contention that defenses of co-defendants charged with first-degree kidnapping, first-degree robbery, first degree and accomplice to first-degree rape were antagonistic. In Emery, the Supreme Court held that defenses were antagonistic because one co-defendant claimed an alibi and the other co-defendant claimed consent. State v. Emery, 174 Wn.2d at 753. Despite the antagonistic defense, the Supreme Court found the defendant contending alibi could not establish prejudice because the direct and circumstantial evidence was strong, he was linked to the offense by his DNA, the jury was instructed to decide each defendant's guilt

separately, and the defendant could not show that the co-defendant would not have testified if the cases had been severed. State v. Emery, 174 Wn.2d at 754.

At the outset Huynh's primary contention was that severance was required because the statements of the co-defendant implicated him. CP 171. At trial, Huynh contended that the defenses of the co-defendants were "diametrically divergent." 1/25/12 RP 86. No explanation of the divergence was provided and the trial court did not find any such inconsistency.

The two defendants may be pointing fingers at one another, but that doesn't mean the case doesn't get tried together. I don't hear any defenses that are the type of defenses or type of conflicts or inconsistencies that should result in an order to sever.

1/25/13 RP 86.

On appeal Huynh does not contend there was such inconsistency. Instead he contends there was no evidence of his intent to manufacture or deliver and therefore the detective's testimony of the drugs and the manufacturing process would not have been admissible. Brief of Appellant at page 18-9. The evidence in this case about what was intended with the drugs was a function of the packaging, quantity and quality of the drugs which was necessarily established by the expert testimony. The evidence would have remained relevant as to Huynh's intent to deliver or manufacture had the defendants been severed.

Huynh has not established the trial court abused its discretion in denial of severance of offenses, or defendants.

**V. CONCLUSION**

For the foregoing reasons, Huynh's convictions and sentence must be affirmed.

DATED this 29<sup>th</sup> day of January, 2013.

SKAGIT COUNTY PROSECUTING ATTORNEY

By:   
ERIK PEDERSEN, WSBA#20015  
Deputy Prosecuting Attorney  
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Karen R. Wallace, declare as follows:

I sent for delivery by: [ X ]United States Postal Service; [ ]ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Sarah McNeel Hrobsky, addressed as Washington Appellate Project, 1511 Third Avenue., Suite 701, Seattle, Washington, 98101. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 29<sup>th</sup> day of January, 2013.

  
KAREN R. WALLACE, DECLARANT