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STATE OF WASHINGTON

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NO. 33700-2-II
Cowlitz Co. Cause NO. 03-1-01565-0

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL GUILLEN,

Appellant.

BRIEF OF RESPONDENT

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STATE'S RESPONSE TO ASSIGNMENTS OF ERROR

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**ISSUES PERTAINING TO STATE'S RESPONSE TO
ASSIGNMENTS OF ERROR**

- 1. WHETHER A TRIAL COURT'S DECISION TO ALLOW ARGUABLE PROPENSITY EVIDENCE REGARDING A LARGER INVESTIGATION INTO A DRUG TRAFFICKING ORGANIZATION OF WHICH THE DEFENDANT MAY HAVE BEEN A LOWER-LEVEL PLAYER DENIED THE DEFENDANT THE RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

2. **WHETHER A TRIAL COUNSEL'S DECISION NOT TO OBJECT TO THE ADMISSION OF TWO BRIEF AND PASSING COMMENTS BY THE INFORMANT, ONE ON DIRECT EXAMINATION THAT SHE "USED TO BUY DRUGS FROM [THE DEFENDANT]" AND ANOTHER ON CROSS EXAMINATION THAT "IT WASN'T THE FIRST TIME" SHE HAD CALLED ANOTHER INDIVIDUAL AND YET THE DEFENDANT SHOWED UP WITH THE DRUGS, DENY THE DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 3, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

3. **WHETHER THE TRIAL COURT'S DECISION NOT TO ALLOW DEFENSE TO CROSS EXAMINE THE CONFIDENTIAL INFORMANT REGARDING WHETHER SHE HAD LIED TO THE POLICE ABOUT HER DRUG USAGE AND WHETHER SHE HAD FAILED TO REPORT CASH PAYMENTS FROM THE LOCAL DRUG TASK FORCE TO THE INTERNAL REVENUE SERVICE AND WASHINGTON STATE DEPARTMENT OF REVENUE, DENIED THE DEFENDANT THE RIGHT TO CONFRONTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

STATEMENT OF THE CASE

On February 7, 2003, in Cowlitz County, WA, Cowlitz-Wahkiakum Drug Task Force Detectives met with Megan Lessard to arrange a controlled purchase of heroin. Megan Lessard was a drug addict working off a pending charge of VUCSA Possession of Cocaine. RP I 35 & 104. Lessard had a prior felony conviction and convictions for crimes of

dishonesty. RP I 35 & 119. Lessard would have been looking at a likely prison sentence had she not decided to work for the Drug Task Force. RP I 36. Even after she had worked off her felony charge Megan Lessard continued to work for the Drug Task Force as a paid informant. RP I 36 & 107. Megan Lessard had been paid up to several hundred dollars per week plus occasional housing and relocation expenses. RP I 36, 39 & 107-108. Lessard was not paid based on the number of people she could buy from but instead was paid based upon her active involvement in the overall investigation whether through purchasing drugs or supplying intelligence. RP I 36-37.

Megan Lessard entered into a contract with the Drug Task Force wherein her charges could be dismissed in exchange for her efforts. RP I 37-38. One condition of the Confidential Informant Contract is to refrain from drug use. RP I 38. Lessard violated the no drug use provision of the contract three times. RP I 40 & 105. Lessard told Kirsten Cain of Offender Services and later Detective Cowan of her first relapse. RP I 108-109. Lessard was later arrest by Detective Cowan for a second relapse. RP I 109. After reporting to Offender Services a third relapse, Megan Lessard was again placed into jail. RP I 110. Lessard was not terminated from the contract but was given a less active role. RP I 40.

Megan Lessard was never under the influence during a controlled buy. RP I 110. Lessard had not used drugs for twenty-five months at the time of her testimony. RP I 111. Detective Cowan testified that the Drug Task Force was investigating a large drug trafficking organization that included Pelon or Hilario Justino Garcia Hernandez and Bebe or Manuel Pedroxa-Barajas. RP I 42-43. Drug Task Force Detectives planned to target everyone they could to get to Pelon including everybody that worked for him. RP I 50.

Detective Cowan and Sergeant Tate observed Megan Lessard be searched at the Hall of Justice on February 7, 2003, by female corrections officer Jillian Mackin. RP I 50 & 97. No money, drugs, or contraband were found during that thorough search. RP I 50 & 100. Detectives asked Megan Lessard to make a phone call to one of the individuals of which she had already given information by the name of Mike. RP I 51-52. Detective Cowan gave the informant \$120 in Task Force buy money. RP I 53. Megan Lessard made the first phone call in the presence of detectives, waited approximately 15 minutes and then made another phone call in the presence of detectives. RP I 53. Before making the first call to Pedro's phone, Megan Lessard attempted to call Mike's cell phone, which was busy. RP I 123. During the first call to Pedro's cell phone she spoke to both Pedro and Mike. Id. Megan Lessard then called them back at Pedro's

cell a second time and they came and met her. RP I 124. Megan Lessard could recognize the voice on the phone as Mike. RP I 123.

Megan Lessard arranged to purchase one-quarter ounce of heroin, negra, or black for \$220, \$100 of which was a debt owed by Pedro to Megan Lessard. RP 123-124. Detectives Cowan and Tate transported Megan Lessard to Market Place on Ocean Beach Highway in an undercover police vehicle. RP I 53-54. At the instruction of detectives, Megan Lessard exited the undercover police vehicle and waited near the pay phones at the market's west entrance within clear view of the detectives. RP 54. After five minutes, Lessard walked from her position and entered a teal green Subaru Legacy. RP I 55. Detectives Cowan and Tate did not attempt to follow the vehicle at this point as it backed around and looped out. RP I 55. Detectives had not seen the Green Subaru before. RP I 56. Detective Cowan could see there were two people in the vehicle. RP I 63.

Prior to the controlled buy Megan Lessard had been given instructions not to leave the area. She was to immediately make contact, give the money, ask for the drugs, exit the vehicle, observe the vehicle drive away, and then return to detectives. RP I 56. Lessard was returned to the original location 18 minutes later. RP I 57. In the interim, Detective Cowan called Megan Lessard on her Task Force issued cell phone because he was

concerned for her safety. RP I 58 & 127. Lessard had an angry and upset demeanor on the phone. RP I 58. After learning she was okay, Detective Cowan disconnected the call. RP I 59. Detective Cowan called back five or ten minutes later. Megan Lessard was still angry and upset. RP I 59. Detectives asked that the phone be handed to the driver. Detective Cowan spoke to the driver as if he were an upset customer who needed either his money or his dope now. RP I 59-60 & 126.

While in the Subaru, Megan Lessard handed the money to Pedro and Mike Guillen handed the drugs to Lessard. RP I 128. About five minutes after the call was terminated Detective Cowan saw Lessard walking to their planned meeting location. RP I 61. Lessard was still angry and upset when detectives picked her up. RP I 61 & 129. Megan Lessard handed detectives seven small bags or plastic balls of a tar-like substance that appeared to be approximately ten grams of heroin. ID I 62 & 129.

Megan Lessard was transported back to the Hall of Justice where she was searched by the same female corrections officer Jillian Mackin. RP I 62 & 97. This and the search prior to the controlled buy were thorough searches including removing of the informant's shoes and socks, shaking out of informant's hair, searching up the thigh area, checking around waistband, searching up and around the armpits, and pulling the informant's bra and shaking it to see if any contraband would fall out. RP

I 99-100 & 112. No money, drugs, or contraband was found during the search. RP 62 & 100. Megan Lessard testified that she never hid drugs or money during a controlled buy. RP I 113. Lessard prepared a written statement at that time. RP 62 & 106.

The suspect heroin was packaged and sent to the State Crime Lab for testing. RP 62. Detectives did not get fingerprints because in their training and experience usable prints can rarely be found on items like baggies in part because they tend to be handled by so many people. RP I 67. Lab results of the suspect drug tested positive for heroin by the Washington State Patrol Crime Laboratory. RP II 61.

The defendant was charged by information on November 6, 2003, with one count of delivery of heroin. CP 1-2. During direct examination, defense counsel objected to Detective Cowan's testimony that the Drug Task Force was investigating a large drug trafficking organization that included Pelon or Hilario Justino Garcia Hernandez and Bebe or Manuel Pedroxa-Barajas on the basis that the evidence was improper propensity evidence. RP I 43. Defense objected to Megan Lessard's testimony on direct examination that she was familiar with a local drug dealer by the name of Pelon and was overruled. RP I 113. Defense objected to Lessard's testimony that she knew Pelon "from buying dope from him and from being at the house with Pedro and was overruled. RP I 114. Defense

objected to the state's question, "Ms. Lessard, did Peon have any individuals that were working for him?" This objection was sustained before Lessard was able to answer. Following a side bar, the state moved on to another line of questioning and did not elicit from Megan Lessard whether anyone else was working for Pelon. RP I 115-119.

On cross-examination, defense counsel attempted to question Detective Cowan about whether Megan Lessard had lied to the Drug Task Force about her relapse into drug use while she was under contract. RP I 79. The court sustained the state's objection, as asking a witness to comment on another witness's credibility. RP I 79. The lead detective did explain in response to this line of questioning that Megan Lessard had stopped contacting the Task Force during the period that she relapsed. RP I 79. During cross-examination of Detective Cowan, defense asked whether Megan Lessard was given a W-2 or a 1099 tax form. The defense also asked whether this was just all under the table money that the informant was responsible for bookkeeping herself. The court sustained the state's relevance objection to both questions. RP I 82.

No objection was made by defense counsel when on direct examination Megan Lessard made a comment that she used to buy drugs from the defendant. RP I 103. Defense counsel also did not object to Megan Lessard's response on cross examination that, "it wasn't the first

time that I had bought from Mike anyways, and that's how they worked all the time." RP II 22.

After the state rested its case, defense rested without calling witnesses and jury instructions were given without objection or exception. RP 70-72. After closing arguments and deliberations, the jury deliberated coming back with a guilty verdict. RP II 88-124 & CP 41. Defendant was given a DOSA sentence and filed this appeal. CP 47-55, 57.

ARGUMENTS

- 1. THE TRIAL COURT'S DECISION TO ALLOW ARGUABLE PROPENSITY EVIDENCE REGARDING A LARGER INVESTIGATION INTO A DRUG TRAFFICKING ORGANIZATION OF WHICH THE DEFENDANT MAY HAVE BEEN A LOWER-LEVEL PLAYER DID NOT DENY THE DEFENDANT THE RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.**

First the court should consider whether the testimony from Detective Cowan regarding the larger drug trafficking organization and the "plan to target everyone that worked for him" amounted to improper 404(b) evidence. RP I 50. At trial defense counsel objected that the comment amounted to improper propensity evidence and was overruled without an ER 403 balancing test on the record. Essentially, defense counsel argued that any testimony regarding an investigation of Pelon was

used to “tar Mr. Guillen” by “using other people’s bad acts” against him. RP I 45. This testimony by Detective Cowan did not tell the jury that Mike Guillen was one of those individuals working for Pelon or any other organization. Instead the testimony was offered to explain the context of the investigation to the jury. Had that brief testimony regarding the overarching investigation not been offered, the jury would have been free to speculate that the defendant was himself the direct target of a Drug Task Force investigation. The testimony was not intended by the state to be offered to prove the character of a person in order to show action in conformity therewith.

Like in *State v. McBride*, 74 Wn.App. 460, 873 P.2d 589 (1994), the testimony was offered for and relevant to show how the defendant and an accomplice were working together and to allow the jury to see the whole sequence of events. In *McBride* an officer testified that he witnessed McBride make what appeared to be three drug sales. *Id.* at 463. He observed Mr. McBride enter an automobile, talk briefly with a person in the automobile, come back to the street, and hand what looked like money to his brother. *Id.* In *McBride*, as in the present case, the state was alleging not only that the defendant was a primary in a delivery charge but alternatively that the defendant was an accomplice. Just as the three prior apparent drug sales in *McBride* were relevant to show sequence of events

and accomplice liability, so was the underlying investigation into Pelon, Bebe, and Pedro in the present case. The limited testimony merely went to explain what might otherwise seem counterintuitive to a jury, that one person might take the money and phone call and another person hand the drugs to an informant. Also like in *McBride*, the evidence was relevant to show what drew detectives' attention to the defendant in the first place. *McBride* at 464.

In *State v. Jackson*, 102 Wash.2d 689, 689 P.2d 76, 79 (1984), the Washington Supreme Court made clear that the trial court even after finding a matter relevant under ER 404(b) is to perform an ER 403 balancing test of prejudice versus probative value. The state concedes that in the present case, despite the request of defense counsel, no balancing test was performed. This division in 1999 outlined the procedure to follow with regard to ER 404(b) evidence.

First, the court must identify the purpose for which the evidence will be admitted. Second, the evidence must be materially relevant. Third, the court must balance the probative value of the evidence against any unfair prejudicial effect the evidence may have upon the fact-finder. Further, to avoid error, the trial court must identify the purpose of the evidence and conduct the balancing test on the record.

State v. Wade, 98 Wash. App. 328, 989 P.2d 576, citing *Saltarelli*, 98 Wash.2d at 362-66, 655 P.2d 697 and *State v. Jackson*, 102 Wash.2d 689, 693-94, 689 P.2d 76 (1984).

Even if the court were to find that this evidence amounted to improperly admitted ER 404(b) evidence, the error is harmless. There are at least two different ways that failure to weigh prejudice on the record is harmless error. The first is when the record is sufficient for the reviewing court to determine that the trial court, if it had considered the relative weight of probative value and prejudice, would still have admitted the evidence. *State v. Carleton*, 82 Wash.App. 680, 919 P.2d 128, 132 citing *State v. Gogolin*, 45 Wash.App. 640, 645, 727 P.2d 683 (1986). As in *State v. McBride*, the evidence in the present case was offered as *res gestae*. Other misconduct is admissible if it is so connected in circumstances or means employed that proof of the other misconduct is necessary for a complete description of the crime charged. *State v. Tharp*, 96 Wn.2d 591, 637 P.2d 961 (1981). On the record before this court it is clear that the statements regarding the larger drug trafficking organization were relevant to show how the Drug Task Force methodically and logically runs its investigations, specifically that names and numbers are not just drawn at random. Additionally, the evidence was necessary to show the common means employed by Mr. Guillen of a phone call being

placed to Pedro or another but Mr. Guillen nonetheless handing off the drugs themselves. Had Pelon, Pedro, or Bebe been on trial in the present case, the testimony that they were targets due to their leadership of a large drug organization would have without question been more prejudicial than probative. However, the same information as applied to Mr. Guillen at most made him out to be a small player in any drug organization.

It stretches reason to suggest that the average juror does not have some idea of how the drug trade works whether from television, Hollywood movies, or just general experience in legitimate commerce. Without question, jurors can be presumed to know that the street level dealers did not purchase their product directly from the grower or manufacturer. Simple logic would suggest that even had the names Pelon, Pedro, and Bebe not been placed into evidence, the jury would have understandably presumed a larger drug organization to exist. The state suggests that any time a jury convicts a street level drug dealer it is implicitly making such a finding. The mere fact that through the admission of brief contextual testimony regarding the broader drug trafficking investigation the jury now had a couple names to fill into that presumed next level up in the hierarchy, does not make the admission of the same more prejudicial than probative to Mr. Guillen. Through this

analysis it is clear that the trial court could have found the legitimate ER 404(b) purpose of res gestae for the contextual testimony offered in this case and the balancing test would have found said evidence more probative than prejudicial as to Mr. Guillen.

Even if this court finds the record insufficient to perform the necessary balancing test, because evidentiary errors under ER 404(b) are not of constitutional magnitude, the appellate court must determine within reasonable probabilities if the outcome of the trial would have been different if the error had not occurred. *State v. Jackson*, 102 Wash.2d 689, 689 P.2d 76, 80 (1984) citing *State v. Robtoy*, 98 Wash.2d 30, 653 P.2d 284 (1982). If the court finds that the outcome of the case would have been the same even without the arguable propensity evidence, then error is harmless. *State v. Carleton* at 132. In the present case the evidence was overwhelming.

Drug Task Force detectives arranged a controlled buy of heroin from the defendant February 7, 2003, in Cowlitz County, WA. The jury had the opportunity to hear testimony directly from the confidential informant Megan Lessard. The jury heard how the confidential informant was thoroughly searched by a female jailer before and after the controlled buy finding no drugs, money, or contraband. The jury heard how multiple phone calls were made to arrange the purchase and that how on at least

one of those calls the informant spoke directly with the defendant. The defendant arrived at the location agreed to over the phone in the passenger seat of a green Subaru. Pedro, the other individual spoken to over the phone during the planning of this purchase was driving the vehicle. Megan Lessard entered the vehicle and was driven away from the scene for a period significantly longer than usual. The jury heard testimony from both the informant and detectives that the detectives made phone calls to Megan Lessard out of some concern for her safety while she was in the green Subaru. Detective Cowan testified that he acted as if he was an angry customer of the informant's that wanted either his drugs or his money back right away. A short time later the informant returned to the prearranged meeting location with the suspect drugs in hand. She no longer had the buy money that had been provided by the Drug Task Force. The informant testified that while in the vehicle, she had handed the buy money to Pedro and the defendant handed her the suspect heroin. The suspect heroin was later tested by the crime laboratory and showed positive for heroin. The jury was given detailed evidence regarding the informant's motivation to testify including the fact that she had at one time been working off felony charges and at another time was working as a paid informant. The jury was also made aware of Megan Lessard's relevant criminal history. Nonetheless, the jury could make the

determination to believe her testimony along with the corroboratory evidence of the other witnesses and convict Mr. Guillen. Judgment as to the credibility of witnesses and the weight of evidence is the exclusive function of the jury. *State v. Smith*, 31 Wash.App. 226, 640 P.2d 25 (1982) citing *State v. Braxton*, 20 Wash.App. 489, 491, 580 P.2d 1116 (1978). In light of this quantum of clearly admissible evidence, error if any, was harmless.

2. **TRIAL COUNSEL’S DECISION NOT TO OBJECT TO THE ADMISSION OF TWO BRIEF AND PASSING COMMENTS BY THE INFORMANT, ONE ON DIRECT EXAMINATION THAT SHE “USED TO BUY DRUGS FROM [THE DEFENDANT]” AND ANOTHER ON CROSS EXAMINATION THAT “IT WASN’T THE FIRST TIME” SHE HAD CALLED ANOTHER INDIVIDUAL AND YET THE DEFENDANT SHOWED UP WITH THE DRUGS, DID NOT DENY THE DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 3, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

“The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052 (1984). Under *Strickland* the defendant must first show that his counsel made errors so serious that he was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Strickland* at 687.

Once the first showing is made, the defendant must show that the deficient performance was so serious as to deprive the defendant of a fair trial. *Strickland* at 687. In any claim of ineffective assistance of counsel, the "[c]ourts engage in a strong presumption counsel's representation was effective." *State v. Townsend*, 142 Wn.2d 838, 843, 15 P.3d 145 (2001), citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In the present case, Appellant's claim of ineffective assistance stems from counsel's decision not to object to two brief and passing comments by the confidential informant that she used to buy drugs from the defendant. If the failure to object could have been legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). In each incident the testimony regarding prior interactions was very brief. In the first instance on direct examination in response to the question, "How is it that you know Mr. Guillen?" the informant replied "I used to buy drugs from him." RP I 103. The informant did not elaborate any further at this time and the prosecutor quickly moved on to the next question about when the informant first began to work with the Drug Task Force. It is entirely reasonable to conclude that defense counsel made the tactical decision not to object so

as not to draw undue attention to such a brief comment. One can easily imagine a scenario where the informant would have gone on to provide significantly more information regarding said previous drug purchases where this very defense counsel would have more likely seen fit to object. This court should not second-guess counsel's strategy on such a close tactical call.

The second error alleged by Appellant is defense counsel's decision not to object to the informant's answer on cross examination that "[I]t wasn't the first time that I had bought from Mike anyways, and that's how they worked all the time." RP II 22. This answer was in response to the following question asked by defense counsel: "Even though you talked to Pedro on the phone; Pedro drove the car; Pedro owed you money; Pedro you'd been buying from; but Mike hands you the stuff?" RP II 21. Counsel essentially opened the door to Megan Lessard's answer. She was making an attempt to explain a pattern that counsel was attempting to make sound unreasonable. In this context, defense counsel's decision not to object to an answer to one of his own questions surely fits into the legitimate trial strategy category. Had counsel objected to an entirely reasonable response to his own question, the jury would have been invited to realize that the defense attorney himself found that statement injurious to his client. Instead counsel chose not to draw attention to the

informant's response. Additionally, even had counsel objected to the comment in this instance the objection very well could have been overruled under the ER 404(b) res gestae exception discussed above. With these two less than desirable alternatives as very real possibilities, counsel's decision not to object surely qualifies as legitimate trial strategy.

A defendant is only denied his right to a fair trial when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). In looking at the entire record in the present case it is clear that Mr. Guillen received effective representation. Trial counsel made vigorous objection to the arguable ER 404(b) testimony discussed at length above. Additionally, counsel correctly identified this case as one most heavily dependent on the informant's testimony. Due to that correct assessment, counsel attacked the informant's credibility in every way possible under the rules of evidence. Appellant states in his brief that "absent the improper propensity evidence, it is likely the jury would have returned a verdict of 'not guilty.'" Brief of Appellant 14. It seems highly improbable that the jury's verdict fell on either or both of these brief comments that went without objection at trial. Appellant has cited absolutely nothing in the record to support this conclusion. Rather it is clear from the verdict that the jury decided to positively weigh the

credibility of confidential informant Megan Lessard, as it would have been impossible for the jury to convict without doing so. Recognizing that the jury must have found Ms. Lessard credible overall, even absent both of these passing comments, the jury surely would have convicted based on the testimony on the controlled buy alone.

3. THE TRIAL COURT'S DECISION NOT TO ALLOW DEFENSE TO CROSS EXAMINE THE CONFIDENTIAL INFORMANT REGARDING WHETHER SHE HAD LIED TO THE POLICE ABOUT HER DRUG USAGE AND WHETHER SHE HAD FAILED TO REPORT CASH PAYMENTS FROM THE LOCAL DRUG TASK FORCE TO THE INTERNAL REVENUE SERVICE AND WASHINGTON STATE DEPARTMENT OF REVENUE, DID NOT DENY THE DEFENDANT THE RIGHT TO CONFRONTATION UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 22 AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Appellant argues that because his counsel was not allowed to question the confidential informant as to “the fact that the defendant had repeatedly lied about her drug use to the police” and “repeatedly violated the law by failing to report thousands of dollars of cash payments to the Internal Revenue Service and the Washington State Department of Revenue” he was denied his constitutional right to confrontation. Brief of Appellant at 17-18. Evidence Rule 608 provides in relevant part:

Rule 608. Evidence of Character and Conduct of Witness
(b) Specific Instances of Conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of

crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, **in the discretion of the court**, if probative of truthfulness or untruthfulness, be inquired into on cross examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

ER 608(b) (emphasis added). With regard to the informant's alleged lying to the police about her drug use, the defendant was allowed significant questioning. In fact during cross-examination, defense counsel asked the following line of questions directly on the lying to police point:

Q: You lied to the police during the course of this investigation?

MR. COPPOLA: Objection; lack of foundation.

THE WITNESS: How –

THE COURT: Overruled.

Q: About your own use, acquisition, and possession of heroin?

A: And what – I – I don't understand.

Q: You were using and lied to them about that?

A: When I was using? No, I just stayed out of contact with them when I relapsed.

Q: Okay, okay.

A: I guess you can say that's a lie by omission, but I didn't lie to them.

RP II 25. This was the final line of questioning in defense counsel's cross-examination of Megan Lessard. Despite Appellant's argument that counsel was not allowed cross examination into whether the informant had lied to the police about her drug usage, the above record clearly establishes that counsel was allowed said line of questioning.

Finally, the trial court would have been well within its discretion in not allowing cross-examination of the informant regarding whether she had reported cash earnings with the Drug Task Force to the IRS or WA Department of Revenue. Appellant argues in his brief that such failure to report cash income would amount to a violation of the law. However, no citation to a particular IRS violation or RCW violation is offered by Appellant. It is not at all clear from the record that even if Ms. Lessard failed to report her cash earnings that anything in violation of the law or remotely fraudulent had transpired. Additionally, even if she had failed to report cash income in violation of the law, such a failure could just as easily be attributable to taxpayer error or oversight as fraud. As such, not allowing the ER 608(b) evidence on cross-examination would have been appropriate. However, and even more importantly, a careful reading of defense counsel's cross examination of the informant Megan Lessard shows that defense counsel made no attempt to question Ms. Lessard about her failure to report arguably taxable income. RP II 12- 25.

The only time in the record that defense counsel questioned a witness with regard to taxable income was during the cross examination of Detective Cowan.

Q: Would you agree or disagree that she was paid in excess of five thousand dollars in the first four months of 2003?

A: That's quite probable, yes.

Q: And did you give her a W-2 at the end of the year, or a 1099?

MR. COPPOLA: Objection; relevance.

THE COURT: Sustained.

Q: So this is just cash, under-the-table money? She's responsible for worrying about the bookkeeping herself?

MR. COPPOLA: Same objection; relevance.

THE COURT: Sustained.

RP I 82. First, it would be a stretch of logic to see how defense counsel's inability to cross examine a Drug Task Force detective on whether moneys paid to an informant came with arguably applicable tax forms goes to truthfulness or untruthfulness of the detective. Second, it would seem an abuse of ER 608(b) to use the cross examination on prior specific instances of conduct of one witness to attack the credibility of another witness. Appellant has cited no authority holding the ER 608(b) can be properly employed in such a manner. Because trial counsel did not attempt to ask the same or a similar line of questions to the confidential

informant, it is impossible to know how the trial judge would have ruled with regard to ER 608(b) in that scenario. Mr. Guillen's confrontation rights were not violated.

CONCLUSION

The trial court's decision not to exclude arguable propensity evidence did not deny the defendant his right to a fair trial. The evidence may have been properly allowed as res gestae but even if an ER 404(b) violation can be found, error was harmless. Trial counsel's decision not to object to arguably prejudicial propensity evidence did not deny the defendant the right to effective assistance of counsel. Counsel's decision not to object fits well within a legitimate trial strategy but even if not found to be legitimate trial strategy it does not follow that absent the failure to object to two passing comments by the informant the result of the trial would be different. The trial court's purported decision not to allow cross-examination of one of the state's key witnesses concerning two particular areas of alleged prejudice and bias did not deny the defendant his right to confrontation. In fact, with regard to lying to police about her drug use the defendant was allowed to question the informant. Defense counsel made no attempt to examine the informant directly regarding arguable failure to pay tax due. This appellate court should affirm the trial court and deny the appeal.

Respectfully submitted this 21st day of August 2006

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 MICHAEL GUILLEN,)
)
 Appellant.)
 _____)

NO. 33700-2-II
Cowlitz County No.
03-1-01565-0

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I, Audrey J. Gilliam, certify and declare:

That on the 21st day of August, 2006, I deposited in the mails of
the United States Postal Service, first class mail, a properly stamped and
address envelope, containing Brief of Respondent addressed to the
following parties:

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Tacoma, WA 98402

John A. Hays
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I certify under penalty of perjury pursuant to the laws of the State
of Washington that the foregoing is true and correct.

Dated this 21st day of August, 2006.

Audrey J. Gilliam

Audrey J. Gilliam