

No. 35439-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL WHEELER

Appellant.

COURT OF APPEALS  
07-110-21  
STATE OF WASHINGTON  
BY: [Signature]  
RECORDED  
MAY 31 2007

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

The Honorable Richard D. Hicks, Judge  
Cause No. 04-1-00177-7

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BRIEF OF RESPONDENT

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## A. STATEMENT OF THE ISSUES

1. Whether the Court's comments that a State witness was present in the courtroom and subject to recall constituted improper comment.

Appellant's Assignments of Error:

1. The trial court erred in commenting on the evidence and thereby indicated to the jury its opinion on the credibility of the two witnesses on the tampering with a witness charge (Count IV) with the result that this conviction should be reversed.

2. The trial court erred in denying Wheeler's motion for a mistrial based on the court's improper comments on the evidence as to Count IV.

2. Whether, in context, the detective's expression of opinion that the quantity of methamphetamine found on defendant's person on April 21 indicated intent to sell constituted impermissible expression of opinion about Wheeler's guilt as to Count II, constructive possession with intent to sell on or about April 20.

Appellant's Assignment of Error:

3. The trial court erred in allowing Detective Rudloff to testify that the amount of methamphetamine recovered evidenced that Wheeler was dealing, which was an improper opinion on Wheeler's

guilt on Count II-unlawful possession of a controlled substance with the intent to deliver.

3. Whether, under the circumstances, the inadvertent use of “on or about April 21” in the “to convict” instruction when the Information referred to “on or about April 20” constituted prejudicial error.

Appellant's Assignments of Error:

5. The trial court erred in allowing Wheeler to be tried and instructing the jury in Count II on the uncharged alternative means of committing the crime on April 21<sup>st</sup>.

6. The trial court erred in failing to give a unanimity instruction on Count II.

7. The trial court erred in allowing Wheeler to be convicted in Count II where the information alleged that this crime occurred on April 20<sup>th</sup> and the to-convict instruction, which became the law of the case, alleged that the crime occurred on April 21<sup>st</sup>.

8. The trial court erred in denying Wheeler's motion for a new trial on Count II.

9. The trial court erred in allowing Wheeler to be represented by counsel who provided ineffective assistance in failing to move for dismissal rather than move for a new trial on Count II.

4. Whether the detective's unsolicited reference to the reason for the execution of a second search warrant the day after defendant's arrest for the conduct which led to Counts I and II constituted undue prejudice to defendant.

Appellant's Assignment of Error:

10. The trial court erred in allowing the State to present inadmissible ER 404(b) testimony over Wheeler's objection of allegedly "stolen" property where Wheeler was not charged with possession of stolen property.

5. Whether evidence of two prior methamphetamine related convictions was properly allowed to impeach defendant's credibility.

Appellant's Assignment of Error:

11. The trial court erred in allowing the State to impeach Wheeler with his prior drug convictions over his objection where Wheeler did not open the door to such impeachment.

6. Whether the court properly denied motions for mistrial on Count IV and new trial on Count II.

Appellant's Assignments of Error:

2. The trial court erred in denying Wheeler's motion for a mistrial based on the court's improper comments on the evidence as to Count IV.

8. The trial court erred in denying Wheeler's motion for a new trial on Count II.

7. Whether reversal is warranted for insufficient evidence or cumulative error.

Appellant's Assignments of Error:

12. The trial court erred in failing to dismiss Wheeler's case where the cumulative effect of the claimed errors materially affected the outcome of the trial.

13. The trial court erred in not taking the case from the jury on all four counts for lack of sufficient evidence.

#### B. STATEMENT OF THE CASE

The jury found that Wheeler sold methamphetamine to a State's informant on April 20, 2004. (Count I). It found that he was in constructive possession with intent to sell methamphetamine and heroin found pursuant to a search warrant executed that same day based on information from the informant. (Counts II and III). Finally, it found that he tampered with the informant witness by conveying a threat to her via a person he met while in jail. (Count IV).

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The informant, Mathis, under continuous surveillance by the Thurston County Narcotics Task Force and after having her person and vehicle searched, drove to a mobile home park where she met Wheeler. They got into his truck and drove off. After making contact with two unidentified individuals and stopping at a feed store, they returned to the mobile home park. Mathis then left Wheeler and went to the police to whom she delivered the methamphetamine Wheeler had given her. After a positive field testing of the drugs, Wheeler was arrested. (Vol. II RP 100-111). A search warrant for the mobile home (Wheeler's residence) was obtained and executed. Included in the search inventory were the bindle of heroin and the 10 bindles of methamphetamine which were the subject matter of Counts II and III. (Vol. II RP 117).

While in jail awaiting trial, Wheeler had contact with an acquaintance, Ted Tetrealt, who testified that Wheeler asked him to convey to an intended State's witness, Mathis, what the jury found to have been a threat to persuade her not to testify against him. (Vol. I, RP 8-10).

### C. ARGUMENT

1. The court's references to witness Tetreault's continued presence in the courtroom after his direct testimony and availability

for recall did not constitute comment on his credibility. (Appellant's assignments of error 1. and 2. quoted above.)

The State's first witness, Ted Tetreault, was called to establish Count IV. This charged Wheeler with soliciting Tetreault to convey a threat to Jean Mathis, the State's informant. (Vol. I, RP 10). After testifying, he remained in the courtroom. Jean Mathis was then called and asked about the conversation. A hearsay objection was entered:

THE COURT: Overruled. Mr. Tetreault's still here in the courtroom to be questioned if you wish. (Vol. I, RP 42).

Questioning by the prosecutor continued; another hearsay objection was entered.

THE COURT: Perhaps, but the objection's overruled as long as she testifies to what she says and in doing so doesn't necessarily incorporate declarations made by Mr. Tetreault out of court. (Vol. I, RP 43).

The jury was excused. The court and counsel entered into an extensive colloquy about the hearsay rule and trial tactics. As interesting as these discussions may be to legal professionals, at issue here is only what was said in the presence of the jury. Tetreault had just finished testifying and the jury could see him still

sitting in the courtroom. The court said nothing about him or about Mathis. It simply stated the obvious. To argue that the jurors even speculated about, much less discussed among themselves (a clear violation of standard instructions) the questions raised *in camera* is itself speculation. Counsel did request a cautionary instruction, and the court gave one which, one might reasonably wonder, may have invited questions that had never occurred to the jurors. (Vol. II, RP 65).

State v. Lane, 125 Wn.2d 825, 889 P.2d 929 (1995), does not lend support to Wheeler's position. There, the appellate court found that a charge to the jury over objection of *both* counsel regarding the reasons (disputed by the parties) for a witness's early release from jail clearly conveyed to the jury the trial court's opinion about the evidence, an error of constitutional magnitude. Still, the Supreme Court found the error harmless because of the overwhelming evidence of guilt. Here, the court said absolutely nothing about the credibility of the State's witness who had just testified and was not recalled to the stand. At most, the court's comments could be construed as a comment on defense counsel's tactics, but no case has been cited to construe such a comment as rising to the level of comment on the actual evidence. Nor is State

v. Trickel, 16 Wn. App. 18, 553 P.2d 139 (1976) helpful. There, the court found that “the trial court’s precautionary measures together with the presumption that a jury will follow them were sufficient to reasonably assure Mr. Trickel of a fair trial”. Trickel, *supra*, at 30. The argument was that the court’s revocation of bail during trial was a comment on the evidence, but there was no evidence that this was communicated to the jury. The court’s comments are informative. “We know of no opinion, however, which purports to present criteria for ascertaining whether or not a ‘probability of prejudice’ has been demonstrated.” Trickel, *supra*, at 27. Here, the trial judge made absolutely no comment about the witness or his potential testimony if recalled or about his credibility, and clearly instructed the jury, an instruction the jury is presumed to accept, that he had no such intention to do so.

More analogous is a recent decision of Division Three finding it harmless error that the trial court erroneously read to the jury venire portions of the State’s Information referring to items which had been previously suppressed. “The trial judge did nothing to convey his personal opinion of the facts or merits of the case during his inadvertent disclosure of the suppressed items.” State v. Sivins, 138 Wn. App. 52, 60, 155 P.3d 982 (2007).

2. The detective's expression of opinion that the quantity of methamphetamine found on Wheeler's person on April 21 was consistent with intent to sell did not constitute an impermissible expression of opinion about his guilt as to Count II—constructive possession with intent to sell on or about April 20. (Appellant's assignment of error 3).

Wheeler argues that the court, *sua sponte* (trial counsel did not object), should have interrupted an experienced officer when he expressed his professional opinion that the quantity of methamphetamine found on Wheeler's person on April 21 was consistent with someone who was dealing. (Vol. III, RP 341). Context is critical here.

Possession of the methamphetamine found on his person on April 21 was not the subject of a charge. Count II charged possession of the substantial amount found during the search the day before, April 20. In its case-in-chief the State did not even ask the detective who executed the second search warrant on April 21 or whether Wheeler had anything on his person at the time of that search. (Vol. II, RP 154). It was only after Wheeler chose to testify that the jury learned from his own mouth that he had had some methamphetamine on his person when he was arrested again the

day after the first search and arrest. On direct examination, his attorney asked him whether he was addicted to methamphetamine and he admitted he was as of April 20, 2004. (Vol. II, RP 245). On cross examination, the prosecutor asked him the obvious question "When did you start smoking meth?" and he responded "About the beginning of---the end of 2003, beginning of 2004" (Vol. III, RP 286). Later, in the cross examination he was asked what was on his person when he was arrested (April 21). He responded "Methamphetamine," identified the packet seized on April 21 and said it was for his personal use, not for sale. (Vol. III, RP 327-328). On redirect, Wheeler's attorney asked him to confirm that this portion was for his personal use and not for sale. (Vol. III, RP 334). This prompted the *rebuttal* testimony of Detective Rudloff to counter Wheeler's self-serving *personal use* testimony by observing *without objection* that from his experience and in his professional opinion the amount seized was consistent with "someone who's dealing...." (Vol. III, RP 341). This testimony had nothing to do with Count II of the information.

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It does not need citation of authority to point out that the quantity of a substance possessed is a key indicator, along with packaging, to distinguish between intent for personal use and intent for sale. The legislature has not chosen to establish a specific quantity level of any controlled substances that is *deemed* to be conclusive or even presumptive of intent to sell.<sup>1</sup>

The detective's statement argued to be a comment on the evidence may be fairly paraphrased as "The greater the amount possessed, the more likely it is for more than personal use." This is not the same as saying "I think he did the deed." or "I think he intended to sell." The detective's comment was not about subjective intent but objective fact.

In State v. Black, 109 Wn.2d 336, 745 P.2d 12 (1992), cited by Wheeler, the court held that expert testimony about a syndrome (rape trauma), when there was no sufficient scientifically-reliable foundation for the *existence* of the syndrome, was an inadmissible comment, a holding obvious in retrospect but not helpful here. State v. Farr-Lenzini, 93 Wn. App. 453, 970 P.2d 313 (1999), also cited by Wheeler, involved an "eluding" case. The trooper was allowed to

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<sup>1</sup> Of interest is the current debate on whether the Legislature should even consider amending current law to establish a quantity presumption for the possession of marijuana for medical use.

testify that he could distinguish between the subjective state of mind of a driver who was only distracted and one who was intentionally eluding him. The court rightly found insufficient foundation for such expertise. Here, the detective expressed no opinion about the mental state of Wheeler at the specific time he was arrested. All he did was make a general comment about the relevance of quantity to intent to sell based on his wide professional experience.

Wheeler argues that counsel was ineffective for failing or choosing not to object to the detective's observation. As stated recently in State v. Sexsmith, 138 Wn. App. 497, 509, 157 P.3d 901 (2007), where counsel did not seek suppression of videotape evidence, this is a high standard to meet:

To prove that the failure to object constituted ineffective assistance of counsel, Mr. Sexsmith would have to show that the failure to object fell below prevailing professional norms, that the objection would have been sustained, and that the result of the trial would have been different if the evidence had not been admitted.

In re Pers. Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004). Mr. Sexsmith also must overcome the presumption that the decision not to object was the result of a deliberate tactical choice. Id.

Wheeler, like Mr. Sexsmith, can make none of the required showings.

In reversing a 2-1 decision of the Court of Appeals which reversed a conviction for perceived incompetence of counsel, our Supreme Court en banc stated the test clearly:

“Effective assistance of counsel’ does not mean ‘successful assistance of counsel.’ The competency of counsel is not measured by the result.... Competency of counsel will be determined upon the entire record.” State v White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

It is respectfully submitted that the only reasonable conclusion to be drawn from a review of this record is that Wheeler’s trial counsel provided an adequate defense of a difficult client in very difficult circumstances.

3. Under the circumstances, the trial court’s inadvertent use of “on or about April 21” in the “to convict” instruction when the Information referred to “on or about April 20” did not constitute prejudicial error. (Appellant’s assignments of error 5-9)

Assignments of error 5-9 refer to Count II of the Information, unlawful possession of methamphetamine with intent to deliver on or about April 20, 2004. No challenge was made in argument nor is it made in Wheeler’s brief that the amount submitted in evidence (10 bindles) (Vol. II, RP 117-16) was insufficient to establish the

“intent to deliver” element of the crime charged in Count II. As noted in the State’s Argument 2 above, Wheeler’s assignment of error #3 leads to some confusion:

“The trial court erred in allowing Detective Rudloff to testify that the amount of methamphetamine recovered (*on the second search, April 21*) evidenced that Wheeler was dealing, which was an improper opinion on *Count II, April 20.*”(emphasis added).

Although the assignment of error raises a legal challenge to Count II (the amount seized pursuant to warrant on April 20), it is based factually on the Detective’s reference to the amount found in defendant’s possession on April 21.

For some reason not of record, the trial court’s instructions pertaining to the controlled substances charged to have been found on or about April 20, #17 for Count III—heroin and #16 for Count II—methamphetamine, both contained the date of on or about April 21. The prosecutor found the scrivener’s error in the court’s Instruction #17 and the court corrected it (Vol. III, RP 371), but neither counsel nor the court noted the identical error in Instruction #16, before or during closing arguments. The date discrepancy found after trial was simply not an issue at trial. There is absolutely nothing in the record to indicate that anyone noticed it. As the

prosecutor pointed out beginning his argument, "...there isn't any argument that we've got drugs. There isn't any argument where the drugs were found. There isn't any argument on *the date* (emphasis added) the drugs were found." (Vol. III, RP 14-17). There wasn't any such argument made by defense counsel either.

The factual issues addressed by both counsel were the credibility of the State's informant Mathis, whose controlled buy led to the April 20 search (Vol. III, RP 375 –prosecutor: Vol. III, RP 397 – defense counsel) and the sufficiency of the evidence to establish dominion and control (Vol. III, RP 382 – prosecutor):

"On the possession with intent to deliver charge, the issue is who had dominion and control over the house, which would mean that person would probably have dominion and control over the drugs as well." (Vol. III, 396 and 408 – defense counsel.) It is speculation to assume that what was of absolutely no concern to trial court or counsel could somehow have confused the jury.

There was passing reference in argument by the Prosecutor to the fact that Wheeler had some methamphetamine on him at the time of the second search on April 21. "No one's even arguing that the following day Mr. Wheeler's caught with a golf ball size of methamphetamine." (Vol. III, RP 373). Defense counsel did refer to

it, but in the context of describing what it means to be an addict, “He uses it on a daily basis. He’s addicted to methamphetamines. So it’s not surprising when he’s caught or found he’s going to have methamphetamines on him.” (Vol. III, RP 405-06). This prompted another comment by the prosecutor in closing (Vol. III, RP 413-14), but it is clear from the context that the focus of both counsel was on Wheeler’s credibility and character as an addict/dealer. Neither treated the “golf ball size” quantity he admitted possessing as the subject matter of a charge, which is not surprising, given that the State offered no evidence of it during its case-in-chief. As pointed out in the State’s Argument 2 above, it was Wheeler himself who chose to tell the jury about it in response to an open-ended question in cross-examination (Vol. III, RP 327).

State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995) and State v. Williamson, 84 Wn. App. 37, 924 P.2d 960 (1996), cited by Wheeler do not support Assignments of Error 5-9. Both cases focus on *insufficiencies* in the charging document. In Vangerpen, the information lacked the premeditation element crucial to a 1<sup>st</sup> degree murder charge. The reviewing courts rejected the trial court’s remedy of allowing amendment after the State rested, reversing without prejudice. In Williamson, the court held

that evidence establishing only speech did not meet the conduct element of the obstruction charge. Here, the evidence submitted clearly established the elements of Count II, the nature of the substance and Wheeler's possession of it. Nor is State v. Brown, 45 Wn. App. 571, 726 P.2d 60 (1986) helpful. Brown also focused on a discrepancy between the information and the nature of the evidence offered in support. The evidence supported conspiring with an Agent Sexton, but the information specifically named one Minium as the co-conspirator. There is nothing erroneous in the trial court's instruction here. Also distinguishable is State v. Severns, 13 Wn.2d 542, 125 P.2d 659 (1942), where the Court granted a new trial because the trial court's instruction allowed the jury to convict under either the "forcibly overcome" or the "fear of force" subsections of the then existing rape statute, but the information specifically charged only the former, rape by forcibly overcoming. A one day difference in date between the information and instruction where both refer simply to *possession* "on or about" is not a difference in the *means* of committing a crime.

Even if, *arguendo*, one accepts Wheeler's speculation that the jury might have focused on the uncharged but voluntarily admitted April 21 possession rather than the charged April 20

possession, State v. Ortega-Martinez, 124 Wn.2d 702, 881 P.2d 231 (1994), does not support a unanimity instruction. There the Court stated at page 707:

The threshold test governing whether unanimity is required on an underlying means of committing a crime is whether sufficient evidence exists to support each of the alternative means presented to the jury.... The evidence is sufficient if after viewing the evidence in a light most favorable to the State any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt.

See also State v. Handran, 113 Wn.2d 11, 775 P.2d 453 (1989), citing State v. Petrich, 101 Wn.2d 566, 573, 683 P.2d 173 (1984) and State v. Whitney, 108 Wn.2d 506, 511, 739 P.2d 1150 (1987):

Even if the acts were characterized as distinct, the error is harmless if a rational trier of fact could have found each incident proved beyond a reasonable doubt.... As the record substantiates sufficient evidence supporting each act, the lack of jury unanimity does not violate defendant's right to a unanimous jury verdict.

Detective Rudloff's experience-based professional opinion that the quantity of the uncharged methamphetamine found on Wheeler's person on April 21, 2004, was indicative of intent to sell, which was offered to contradict Wheeler's self-serving statement that it was for his personal use only (a credibility challenge), clearly meets this test. Therefore, even if Wheeler's "law of the case"

argument based on State v. Ng, 110 Wn.2d 32, 750 P.2d 531 (1988), were applicable, to wit: instruction 17 served as a charge, the charge was supported by sufficient evidence. A clearly more reasonable interpretation of what happened is the trial court's own: "...there is no basis, given the interpretation of the jury instructions and the reading of the information taken as a whole, that the jury was confused on the guilty verdict finding for Count II of the sixth amended information" (CP 105).

4. The detective's unsolicited reference to the reason for the execution of a second search warrant the day after Wheeler's arrest for the conduct which led to Counts I and II did not constitute undue prejudice to defendant. (Appellant's Assignment of Error 10).

The prosecutor asked an open-ended question of Detective Hamilton (Vol. II, RP 148):

Q. Now, what was your involvement with Mr. Wheeler over the next 24 hours? (referring to the day after the controlled buy and execution of the search warrant on Wheeler's premises).

A. I believe it was the 21<sup>st</sup> of April we came back with another warrant in hand for some stolen property we had found the previous day.

The trial judge had no difficulty explaining his reason for summarily overruling the objection to the officer's volunteered reason for the warrant (Vol. II, RP 150):

"He's not being tried for any stolen property in this case. So it's not being offered as to whether Mr. Wheeler stole something or not. It's being offered to show why the police did what they did."

On continued examination of the witness, the prosecutor made no reference to the reason for the warrant (Vol. II, RP 153); nor was any reference made by defense counsel. As a practical matter, the reason for the second warrant was a non-issue in the case.

ER 401 - 404 and the cited cases interpreting them would be relevant if the State had offered any evidence to support an argument that Wheeler was somehow connected to stolen property. The State offered no such evidence. The State made no such argument. The open-ended question of the prosecutor cannot reasonably be construed as an attempt to "elicit" such evidence as suggested by Wheeler (Br. of Wheeler, at 23). The officer volunteered the questioned adjective "stolen" to describe the reason for the second search warrant. As noted above, the adjective was simply dropped on continued examination and was

never the subject of argument. The “propensity” argument made by Wheeler on appeal is one he raised only to criticize it. (Br. of Wheeler, at 24-24). The simple response to this straw man argument is that there is nothing in the record to even suggest that the State made any such argument at trial.

5. Evidence of two prior methamphetamine-related convictions was properly admitted to impeach Wheeler’s credibility. (Appellant’s Assignment of Error 11).

To address this assignment of error, it is necessary to explain from the record exactly how the subject of these two prior convictions arose at trial. Wheeler chose to testify. That may not have been a surprise to the prosecutor. It may not even have been a surprise that on direct examination by his attorney he admitted being addicted to methamphetamines. What was apparently surprising was the date he gave (Vol. II, RP 245):

Q. Back in April of 2004 did you use meth?

A. Yes, I did.

Q. You addicted to it?

A. I was *at the time*, yeah.” (emphasis added)

This was surprising because the prosecutor knew of Wheeler's lengthy record of controlled substance convictions, including methamphetamine, prior to 2004. The prosecutor stated,

Your honor, I would argue that Mr. Wheeler has opened the door. When I asked how long he'd been smoking methamphetamine, he said 2003. He has convictions for possessing methamphetamine in 1992, in 1993, another in 1997, another one in 1998, another one in 2000, and a second one in 2000. So he has opened the door by simply saying he had started smoking meth in 2003. It's just not the case.

(Vol. III, RP 287-88).

What was no surprise was that the prosecutor began his cross-examination by following up on Wheeler's admission (Vol. III, RP 286):

Q. *When* (emphasis added) did you start smoking meth?

A. About the beginning of—the end of 2003, beginning of 2004.

Clearly to the prosecutor this was a blatant misstatement of his criminal history.

Wheeler's attorney asked for the jury to be excused during argument. The trial judge immediately addressed the issue and had no trouble ruling on the issue:

I agree that it's Mr. Wheeler who has put this on the table by saying he just began with methamphetamine in 2003. Now I don't know what the truth is, but if there's something that contradicts that, then he's

opened the door to allow the government to show that contradiction. ...He can't misstate the facts. ...But here Mr. Wheeler is trying to give the impression that this is something new to him...he never smoked meth before 2003 and then he became addicted to it. That's the impression the jury has at this point. ...[T]hat's a very sympathetic story. Here's someone who tries it and gets addicted. That's the impression the jury has been left with because of Mr. Wheeler—not because of Mr. Graham's (the prosecutor) questions but because of Mr. Wheeler's answers to those questions. So if there are facts that contradict that, the other side has to be allowed to show those.

(Vol. III, RP 288-91).

This was an informed and thoughtful exercise of judicial discretion. In his turn the prosecutor exercised careful judgment in his care to offer into evidence only Wheeler's convictions for methamphetamine, not all his prior controlled substance convictions. "Any other substance I would agree isn't relevant in regards to the door that Mr. Wheeler's opened." (Vol. III, RP 294). The door was wide open to challenge Wheeler's credibility and he was properly required to admit he had opened it (Vol. III, RP 298-99):

Q. Mr. Wheeler, you responded to my question that when you started using methamphetamine, you said sometime in 2003 to 2004. Do you remember that statement?

A. Yes.

Q. And actually you were convicted for possessing methamphetamine back on September 15, 1999, weren't you?

A. Yes.

Q. And again convicted for possessing methamphetamine on September 28<sup>th</sup> of 1999, weren't you?

A. Yes.

It is respectfully submitted that this is a classic example of proper impeachment of a less than forthright defendant. Had Wheeler simply told the truth on direct examination and admitted his problems with methamphetamine prior to 2004, the prior convictions would not have been admissible.

As Wheeler correctly points out, it is well established law in Washington that evidentiary rulings will not be disturbed absent abuse of discretion, and that the trial court has the discretion to admit otherwise inadmissible evidence if a witness "opens the door" during direct examination. As pointed out above, it is obvious from the record that both the trial court and the deputy prosecutor were scrupulous about complying with ER 609 (a). The *Alexis* factors, State v Alexis, 95 Wn.2d 15, 19, 621 P.2d 1269 (1980), merit comment. It is abundantly clear from the record that:

(1) Wheeler had a lengthy criminal record.

(2) The two admitted controlled substance convictions dated to the recent past, 1999.

(3) They were for methamphetamine.

(4) Wheeler was a mature seasoned criminal.

(5) At least in Appellant's belief, "...this case essentially turned on whom the jury was going to believe." (Br. of Wheeler, at 30).

(6) On re-cross Wheeler admitted he had been less than candid during direct.

Because these facts were well known to and discussed between the court and counsel, it is respectfully submitted that any error alleged based on State v. Rivers, 129 Wn.2d 697, 921 P.2d 495 (1996), is clearly harmless. As the Rivers court, which found the error in question harmless, pointed out, an erroneous ruling under ER 609 (a) is reviewed under the non-constitutional harmless error standard. Id. at 706. Such error is not reversible unless, had it not occurred, the outcome of trial would have been materially affected. In retrospect, despite Wheeler's counsel's expressed belief, the record indicates that Wheeler's credibility was not much of a factor at trial. For Count I, it was the credibility of the informant; for Counts II and III, it was the credibility of witnesses establishing

dominion and control; for Count IV, it was the credibility of the informant and witness Tetreal who conveyed Wheeler's threat to her that mattered.

6. The court properly denied motions for mistrial on Count IV and new trial on Count II. (Appellant's Assignments of Error 2 and 8).

As Wheeler correctly notes, in motions for mistrial "[t]he Court has wide discretion to cure trial irregularities and the standard of review is an abuse of discretion." State v Post, 118 Wn.2d 596, 620, 837 P.2d 599 (1992). The same test applies in reviewing motions for new trial: "...a trial judge is invested with broad discretion in granting motions for new trial. The exercise of that discretion will not be disturbed on appeal absent an abuse of discretion". State v Williams, 96 Wn.2d 215, 221, 634 P.2d 868 (1981).

The Supreme Court agreed with the Court of Appeals that none of the grounds cited by the trial court was sufficient to support its decision to grant a new trial, and so reversed it, reinstating the conviction. Because Wheeler's challenge to the sufficiency of evidence is essentially a challenge to the credibility of State

witnesses, another statement of well established law in the Williams decision merits attention.

It is the province of the jury to weigh the evidence, under proper instructions, and determine the facts. It is the province of the jury to believe or disbelieve any witness whose testimony it is called upon to consider. If there is substantial evidence (as distinguished from a scintilla) on both sides of any issue, what the trial court believes after hearing the testimony, and what this court believes after reading the record, is immaterial. The finding of the jury, upon substantial conflicting evidence is final.

Id. at 222.

7. Sufficient evidence was presented to the jury to support conviction on all counts and errors, if any, were harmless and non-cumulative. (Appellant's Assignments of Error 12 and 13).

The arguments that errors, if any, were cumulative and that counsel was ineffective can only be described as conclusory. Reference to the record itself, as a whole, reveals substantial evidence to support all four of the jury's guilty verdicts. The delivery charge, Count I, was supported by the testimony of officers who worked with the informant, searched both her and her car before and after she met with Wheeler, and had her under constant surveillance during the "controlled buy." Both witnesses and

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physical evidence were presented to the jury to establish Wheeler's "dominion and control" of the premises where the heroin and methamphetamine charged in Counts II and III were found. Finally, the jury was the sole judge of the credibility of informant Mathis and of witness Tetreault supporting Count IV, the tampering charge. The jury found them credible. Based on the authorities and arguments set forth above, it is respectfully submitted that any errors, if any, were harmless, separable and non-cumulative. Division I of the Court of Appeals recently stated the test to be applied in reviewing these routine conclusory arguments:

Evidence is sufficient if, after reviewing it in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A sufficiency claim admits the truth of the State's evidence and all inferences that can reasonably be drawn therefrom. Salinas, 119 Wn.2d at 201. Intent may be inferred from conduct, State v. Vargas, 151 Wn.2d 179, 201, 86 P.3d 139 (2004), and this court must defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence. State v. Walton, 64 Wn. App.410, 415-16, 824 P.2d533 (1992).

State v. Elmi, 138 Wn. App. 306, 313, 156 P.3d 281 (2007).

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D. CONCLUSION

Based on the arguments set forth above and the authorities cited, the State respectfully requests that this Court affirm Wheeler's conviction on all charges in this case.

Respectfully submitted this 20 of August, 2007.

  
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