

NO. 35794-1

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

STATE OF WASHINGTON, RESPONDENT

v.

HENRY I. PULLEN, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kathryn J. Nelson

No. 06-1-02559-0

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

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5. Did the trial court erroneously impose two \$500 penalty assessments and should this court remand only for the deletion of the assessment on the misdemeanor conviction? (Appellant's Assignment of Error No. 6)

B. STATEMENT OF THE CASE.

1. Procedure

On October 11, 2006, Henry Isaac Pullen, also known as Steven Irons, hereinafter "defendant," was charged by amended information with attempted unlawful delivery of a controlled substance, cocaine, unlawful possession of a controlled substance, cocaine, with the intent to deliver, and harassment. CP 9-10. On October 11, 2006, both parties appeared for trial.

At the conclusion of the trial, the defendant was convicted of unlawful possession of a controlled substance with intent to deliver, and harassment. CP 68-69. The defendant was sentenced to 120 months incarceration for the possession with intent to deliver conviction, and 12 months on the harassment conviction to be served concurrently. CP 77-88, 89-90. The defendant filed a timely notice of appeal on January 12, 2007. CP 76.

2. Facts

a. Facts adduced at the CrR 3.5 hearing

The defendant was contacted when Lakewood Police Officer Ryan Hamilton, acting in an undercover capacity, attempted to conduct a controlled narcotics purchase using an informant. (10/11/06) RP¹ 20. After attempting to purchase crack cocaine from the defendant, the defendant told Officer Hamilton that he would protect him, and that he “. . . had the stuff, that the stuff was good.” (10/11/06) RP 21. The defendant told Officer Hamilton that he had Officer Hamilton’s back, and that he would protect him. (10/11/06) RP 24.

After noticing that Officer Hamilton was wearing a firearm, the defendant told Officer Hamilton, “I will fucking shoot you. Get into your fucking car and leave. Don’t come back.” (10/11/06) RP 23. The

¹ There are six separate volumes of verbatim report of proceedings which are independently numbered. For convenience of reference, the State will refer to the date of the proceeding followed by the page number.

defendant then stated “I’m not joking. I will fucking shoot you. Get into your fucking car and fucking leave.” Id.

Officer Hamilton placed the defendant under arrest, and advised the defendant of his rights from a preprinted card. (10/11/06) RP 24. The defendant acknowledged that he understood his rights and waived them. (10/11/06) RP 24-25.

Lakewood Police Officer John Conlon also had contact with the defendant on June 8, 2006. (10/11/06) RP 31. Officer Conlon placed the defendant under arrest. Id. The defendant told Officer Conlon that the cocaine was his, and that he was not a big time dealer, just a small time dealer. (10/11/06) RP 32.

At the CrR 3.5 hearing, the defendant testified on his own behalf. (10/11/06) RP 37. The defendant stated that Officer Conlon read him his Miranda² rights. The defendant stated that he had understood his rights, but that he did not make any statements to the officers after he had been advised of his rights. (10/11/06) RP 39.

The trial court found that the defendant had been advised of his rights, and that even the defendant acknowledged that he had been advised of his rights. (10/11/06) RP 43. The court also found that the defendant’s statements were made knowingly and voluntarily, and were therefore admissible at trial. (10/11/06) RP 43-44; CP 71-72.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

b. Facts adduced at trial.

On June 8, 2006, Officer Ryan Hamilton was working with an informant and conducting a narcotics investigation. (10/12/06) RP 61. The informant working with Officer Hamilton was to buy \$40 worth of crack cocaine. (10/12/06) RP 62.

Before the transaction, the confidential informant was strip searched to ensure that the informant did not possess any drugs or money. (10/12/06) RP 63. No drugs or money was located on the informant. Id. The informant was then provided with \$40 in prerecorded buy money (10/12/06) RP 60-61, 64.

Officer Hamilton and the informant spoke to the defendant, and arranged a meeting area. (10/12/06) RP 64. The informant made contact with the defendant, but was not able to complete the drug purchase. (10/12/06) RP 65. Instead, after the informant and the defendant were together for approximately ten minutes, the defendant stepped out of the vehicle he was in and approached Officer Hamilton. (10/12/06) RP 65.

The defendant shook Officer Hamilton's hand, gave him a hug, and told Officer Hamilton that he did not have anything to worry about. (10/12/06) RP 65. As part of his undercover role, Officer Hamilton told the defendant that he was on medication for migraines, and that he had been beaten up. (10/12/06) RP 65-66. The defendant told Officer Hamilton that he was not going to get beaten up, and that he had the

“stuff.” (10/12/06) RP 65-66. The defendant told Officer Hamilton that he had the “stuff” he wanted. (10/12/06) RP 67.

The defendant noticed that Officer Hamilton was wearing a firearm on his hip. (10/12/06) RP 66. After observing that Officer Hamilton was armed, the defendant’s demeanor instantly changed. (10/12/06) RP 67. The defendant began to threaten Officer Hamilton. Id. The defendant told Officer Hamilton, “I will fucking shoot you. Get into your fucking car and leave. Don’t come back.” (10/12/06) RP 68. The defendant stated that “I’m not joking. I will fucking shoot you. Get into your fucking car and fucking leave.” (10/12/06) RP 68.

The defendant was placed under arrest and advised of his rights. (10/12/06) RP 69. A search incident to arrest revealed that the defendant had the \$40 prerecorded buy money that had been provided to the informant. (10/12/06) RP 69-70. Also in the defendant’s possession was an additional \$139 and a cell phone. (10/12/06) RP 70. Using his personal cell phone, Officer Hamilton dialed the phone number that the informant had called earlier, and the phone that had been in the defendant’s possession rang. (10/12/06) RP 74.

While inside the vehicle, the defendant was seated in the driver’s seat. (10/12/06) RP 90. There was a bag of drugs on the driver’s side floor. Id. There was also another cell phone and some money on the ground outside of the vehicle. Id. The bag had been open on the floorboard. (10/12/06) RP 91. The defendant told Officer Conlon that he

was not a big time dealer, just a small time dealer. (10/12/06) RP 107-108.

Jane Boysen, a forensic scientist with the Washington State Patrol, tested the drugs that were recovered in the defendant's floorboard. (10/12/06) RP 95, 129. Boysen determined that the substance recovered contained cocaine and that the substance weighed 2.5 grams. (10/12/06) RP 133.

The defendant testified that on June 8, 2006, he received a telephone call from a woman whom he agreed to meet. (10/12/06) RP 137-138. The defendant stated that the woman owed him \$40. (10/12/06) RP 138. He stated that he had given the woman \$40 out of the kindness of his heart approximately a month earlier. Id. At the designated meeting location the woman got into the defendant's car and gave him money. (10/12/06) RP 138-139. He denied getting out of his car to talk to anyone else. (10/12/06) RP 139. He stated that the police came to his car and placed him under arrest for drugs. (10/12/06) RP 141. The defendant denied making any statements about being a small time drug dealer. (10/12/06) RP 142. The defendant stated that the money he had in his possession was from his wife. (10/12/06) RP 142.

C. ARGUMENT.

1. THE RECORD BELOW IS SUFFICIENT TO SUPPORT THE COURT'S FINDING THAT THE DEFENDANT WAS PROPERLY ADVISED OF HIS RIGHTS WHEN OFFICER HAMILTON STATED THAT THE DEFENDANT WAS READ HIS RIGHTS FROM A PREPRINTED CARD, THE DEFENDANT ACKNOWLEDGED THAT HE WAS READ HIS RIGHTS, AND THE SPECIFIC RIGHTS THAT WERE READ TO THE DEFENDANT WERE INTRODUCED AT TRIAL.

The adequacy of the Miranda warnings are reviewed de novo. State v. Hopkins, 134 Wn. App. 780, 785, 142 P.3d 1104 (2006). Under Miranda, a suspect in custody "must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning." State v. Brown, 132 Wn.2d 529, 582, 940 P.2d 546 (1997), cert. denied, 523 U.S. 1007, 118 S. Ct. 1192, 140 L.Ed.2d 322 (1998)(citing Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966)).

Before a court will admit a defendant's custodial statements, the State must prove by a preponderance of the evidence that the defendant was advised of his Miranda rights, and made a voluntary, knowing, and intelligent waiver of those rights prior to making the statements to police.

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966); State v. Braun, 82 Wn.2d 157, 160-61, 509 P.2d 742 (1973). A waiver may be expressly made or implied “where the record reveals that a defendant understood his rights and volunteered information after reaching such understanding.” State v. Terrovona, 105 Wn.2d 632, 646, 716 P.2d 295 (1986). In reviewing whether a defendant’s statements while in custody were voluntarily made, a reviewing court determines whether there was substantial evidence in the record from which the trial court could have found a confession was voluntary. State v. Broadaway, 133 Wn.2d 118, 129, 942 P.2d 363 (1997). For due process purposes, the voluntariness of a confession is determined from the totality of the circumstances under which it was made. State v. Aten, 130 Wn.2d 640, 663-64, 927 P.2d 210 (1996). Some factors considered are the defendant's physical condition, age, mental abilities, physical experience, and police conduct.

In the present case, the defendant asserts that there was not sufficient evidence to support a finding that the defendant was advised of all of the specific rights required by law because the rights were not specified during the CrR 3.5 hearing. Brief of Appellant at page 6. While the State agrees that the specific rights that were read to the defendant are necessary in order to determine if he was properly advised, the record in this case does contain the specific rights that were read to the defendant, and those rights include all of the necessary advisements under Miranda.

The State concedes that the specific rights that were read to the defendant were not introduced at the CrR 3.5 hearing, those rights were specifically read into the record during trial. At trial, Officer Hamilton was asked to read into the record the rights that he read to the defendant from his preprinted card. (10/12/06) RP 69. Officer Hamilton stated:

Let me just get my wallet out. (Reading:) You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to talk to an attorney before answering any questions. You have the right to have your attorney present during the questioning. If you cannot afford an attorney, one will be appointed to you without cost before or during any questioning if so desired.

(10/12/06) RP 69.

While it would have been preferable to have the specific rights read during the CrR 3.5 hearing, the record clearly supports the finding that the defendant was properly advised of his rights. Any failure to introduce the precise language that was read to the defendant is harmless, as the exact language is contained in the record and clearly complies with Miranda. Only if the outcome of the trial would have been different had the errors not occurred is the error deemed reversible error. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

In this case, there was a lack of specificity during the CrR 3.5 hearing as to what rights were read to the defendant. That ambiguity was later clarified at trial when the statements were introduced. The defendant has not asserted that the rights read by Officer Hamilton during trial were

either inadequate or inaccurate. Any error in not stating which rights were read to the defendant at the pretrial hearing was harmless because the rights were read at trial.

Second, if this court were to find that the record is insufficient to determine what specific rights the defendant was advised of, this court should require additional evidence to be taken pursuant to RAP 9.11, as it appears that the defendant was properly advised of his rights and a new trial would be unnecessarily expensive.

2. WHEN VIEWED IN THE LIGHT MOST FAVORABLE TO THE STATE, SUFFICIENT EVIDENCE WAS PRESENTED THAT THE DEFENDANT COMMITTED THE CRIME OF POSSESSION OF A CONTROLLED SUBSTANCE WITH THE INTENT TO DELIVER WHEN THE DEFENDANT MET THE INFORMANT AFTER THE INFORMANT ARRANGED A MEETING, THE DEFENDANT HAD IN HIS POSSESSION THE PRERECORDED BUY MONEY, THE DEFENDANT TOLD OFFICER HAMILTON HE HAD THE "STUFF" OFFICER HAMILTON WANTED, THE DEFENDANT HAD OVER TWO GRAMS OF COCAINE IN HIS POSSESSION, AND ADMITTED THAT HE WAS A DRUG DEALER.

The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993); State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990) (citing State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), and Jackson v.

Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979)). Also, a challenge to the sufficiency of the evidence admits the truth of the State's evidence and any reasonable inferences from it. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), rev. denied, 111 Wn.2d 1033 (1988) (citing State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965)); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981), review denied, 95 Wn.2d 1030 (1981). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

Circumstantial and direct evidence are considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). In considering this evidence, “[c]redibility determinations are for the trier of fact and cannot be reviewed upon appeal.” State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, rev. denied, 109 Wn.2d 1008 (1987)).

The written record of a proceeding is an inadequate basis on which to decide issues based on witness credibility. The differences in the testimony of witnesses create the need for such credibility determinations; these should be made by the trier of fact, who is best able to observe the witnesses and evaluate their testimony as it is given. On this issue, the Supreme Court of Washington said:

Great deference . . . is to be given to the trial court's factual findings. In re Sego, 82 Wn.2d 736, 513 P.2d 831 (1973); Nissen v. Obde, 55 Wn.2d 527, 348 P.2d 421 (1960). It, alone, has had the opportunity to view the witnesses' demeanor and to judge his veracity.

State v. Cord, 103 Wn.2d 361, 367, 693 P.2d 81 (1985). Therefore, when the State has produced evidence of all the elements of a crime, the decision of the trier of fact should be upheld.

Where possession with intent to deliver was inferred from possession of a quantity of narcotics, at least one additional factor must be present. State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993). For example, an observation of a drug transaction along with possession of a quantity of narcotics, and possession of a large amount of money, would be sufficient evidence of intent to deliver. Id. at 484. Other factors include an informant's tip combined with a large quantity of drugs or cut and uncut drugs, a cutting substance for the drugs, and packaging materials. Id. at 484. When no delivery is observed, but a large amount of cash is discovered, in addition to possession, it is sufficient to establish intent to deliver. State v. Lopez, 79 Wn. App. 755, 769, 904 P.2d 1179 (1995), disapproved on other grounds, State v. Adel, 136 Wn.2d 629, 640, 965 P.2d 1072 (1998).

“Specific criminal intent may be inferred where a defendant’s conduct plainly indicates the requisite intent as a matter of logical

probability.” State v. Hutchins, 73 Wn. App. 211, 216, 868 P.2d 196 (1994); State v. Stearns, 61 Wn. App. 224, 228, 810 P.2d 41, rev. denied, 117 Wn.2d 1012 (1991).

It is undisputed that the defendant possessed the cocaine or that the acts occurred in the State of Washington. Brief of Appellant at page 17, (10/12/06) RP 62, 90. The only element the defendant now disputes is whether the evidence presented was sufficient to establish an intent to deliver the cocaine.

The defendant relies on State v. Brown, 68 Wn. App. 480, 843 P.2d 1098 (1993). Brown, however, is distinguishable from the case at bar. In Brown, the court found that there was insufficient evidence of possession with intent to deliver because:

Brown had no weapon, no substantial sum of money, no scales or other drug paraphernalia indicative of sales or delivery, the rocks of cocaine were not separately packaged nor were separate packages in his possession, the officers observed no actions suggesting the sales or delivery or even any conversations which could be interpreted as constituting solicitation.

Id. at 484 (emphasis added).

In the present case, while the defendant did not have a weapon or drug paraphernalia, the defendant’s own actions suggested an intent to deliver. The defendant arranged to meet the informant after the informant called him. The informant provided the defendant with prerecorded buy money, and the defendant told Officer Hamilton that he had the “stuff” he

wanted. It was only after the defendant observed that Officer Hamilton was wearing a firearm that the defendant terminated the transaction. It is clear from the defendant's behavior up to that point, however, that he intended to provide Officer Hamilton with drugs.

The defendant also relies on State v. Hutchins, 73 Wn. App. 211, 868 P.2d 196 (1994), but such reliance is misplaced. In Hutchins, the defendant was stopped for passing another vehicle in a no passing zone. Id. at 217-218. Once stopped, the defendant gave a false name, there were no packaging materials in the car, no scales or paraphernalia, and the drugs were not separately packaged. Id. In the present case, the defendant specifically met with the informant who was trying to arrange a drug transaction, had possession of the buy money, and told Officer Hamilton that he had the "stuff" he wanted. Such factors are clearly additional indications of the defendant's intent to deliver that were not present in Hutchins.

The defendant also relies on State v. Hagler, 74 Wn. App. 232, 872 P.2d 85 (1994)³. Hagler, however, supports the State's position. In Hagler, the defendant was approached after the officer saw him hunched over and nervously stuffing something under his vehicle's seat. Id. at 233.

³ The defendant also appears to misstate the facts of Hagler. The defendant asserts that an actual delivery occurred in Hagler, but Hagler did not ever participate in a drug delivery. Brief of Appellant at page 15. Hagler also did not have narcotics pre-packaged for delivery.

The officer then noticed four or five white rocks, which he believed to be cocaine. Id. A total of 2.8 grams of cocaine was recovered. Id. The defendant was found to be in possession of \$342. Id. The defendant gave the officer a false name and attempted to flee. Id. The court held:

In this case, we exclude from consideration the State's argument that Hagler's nervousness, his giving a false name and his flight show consciousness of guilt and therefore provide further evidence from which the factfinder could infer intent to deliver. These facts beg the question of *which* of the two possible crimes Hagler felt guilty about—do his actions show that he knew he possessed cocaine or that he knew he intended to deliver it? The additional factor must be suggesting of sale as opposed to mere possession in order to provide substantial corroborating evidence of intent to deliver.

We have allowed the inference of intent to deliver to be drawn where the defendant possessed drugs along with a gram scale and \$850 in cash. State v. Lane, 56 Wn. App. 286, 297-298, 786 P.2d 277 (1989). Here, accompanying the possession of 24 rocks of cocaine, the additional element suggestive of sale is the sum of \$342 in the hands of a juvenile. The inference from that much cash provided circumstantial evidence for the trial court to weigh in deciding that the State had met its burden of proof.

Id. at 236.

The present case is similar to Hagler. The defendant and an informant arranged a meeting area. (10/12/06) RP 64. The defendant told Officer Hamilton that he had the “stuff” he wanted, and that he had nothing to worry about. (10/12/06) RP 65-67. The defendant had the \$40 in prerecorded buy money in his possession, and 2.5 grams of cocaine. (10/12/06)RP 69-70, 133. This defendant, like Hagler, had over two

grams of cocaine in his possession, in addition to a large amount of cash. The defendant had an additional \$139 in cash, and a cell phone in his possession, and told Officer Hamilton that he was a small time dealer. (10/12/06) RP 70, 107-108. It is clear from the defendant's actions and statements that he intended to sell the cocaine in his possession. He even admitted to Officer Hamilton that he was a dealer.

3. THE PROSECUTOR'S STATEMENTS IN REBUTTAL CLOSING ARGUMENT WERE PROPER ARGUMENT AND, ALTERNATIVELY, WERE NOT FLAGRANT AND ILL-INTENTIONED AND DO NOT REQUIRE REVERSAL.

A defendant claiming prosecutorial misconduct bears the burden of demonstrating that the remarks or conduct was improper and that it prejudiced the defense. State v. Mak, 105 Wn.2d 692, 726, 718 P.2d 407, cert. denied, 479 U.S. 995, 107 S. Ct. 599, 93 L.Ed.2d 599 (1986); State v. Gentry, 125 Wn.2d 570, 640, 888 P.2d 570 (1995). If a curative instruction could have cured the error and the defense failed to request one, then reversal is not required. State v. Binkin, 79 Wn. App. 284, 293-294, 902 P.2d 673 (1995), overruled on other grounds by State v. Kilgore, 147 Wn.2d 288, 53 P.3d 974 (2002). Where the defendant did not object or request a curative instruction, the error is considered waived unless the court finds that the remark was "so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." Id.

To prove that a prosecutor's actions constitute misconduct, the defendant must show that the prosecutor did not act in good faith and the prosecutor's actions were improper. State v. Manthie, 39 Wn. App. 815, 820, 696 P.2d 33 (1985), citing State v. Weekly, 41 Wn.2d 727, 252 P.2d 246 (1952).

In determining whether prosecutorial misconduct warrants the grant of a mistrial, the court must ask whether the remarks, when viewed against the background of all the evidence, so tainted the trial that there is a substantial likelihood the defendant did not receive a fair trial. State v. Russell, 125 Wn.2d 24, 85, 882 P.2d 747 (1994); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983). In deciding whether a trial's irregularity warrants a new trial, the court considers: (1) the seriousness of the irregularity; (2) whether the statement was cumulative of evidence properly admitted; and (3) whether the irregularity could have been cured by an instruction. State v. Crane, 116 Wn.2d 315, 332-33, 804 P.2d 10 (1991). The trial court is in the best position to assess the impact of irregularities. See State v. Mak, 105 Wn.2d 692, 701, 718 P.2d 407 (1986). The court will disturb the trial court's exercise of discretion only when no reasonable judge would have reached the same conclusion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). In closing argument, a prosecutor is permitted reasonable latitude in arguing inferences drawn from the evidence admitted during testimony. State v. Papadopoulos, 34 Wn. App. 397, 401, 662 P.2d 59 (1983).

During rebuttal closing argument by the State, the State argued, in part:

He never got out of the car. You are allowed to use your common sense. Based on everything you heard, you are judges of credibility. You decide. Did all the officers get up and lie? Did they tell you things that they just made up? They don't like Mr. Pullen? I don't think that's the case. Was he merely making a loan repayment? Was the phone call that was made by the informant to the passenger—they want you to believe possibly the passenger threw the cocaine in the front seat. It doesn't make sense, folks. Use your common sense. You are allowed to use it when you are discussing this.

...

I ask that you find him guilty. I ask you to find him guilty of possession with intent. He possessed it, and he intended to deliver that cocaine to community members. I ask you to convict him of each charge.

(10/12/06) RP 169, 171.

No objections were made during either portion of the State's rebuttal. Therefore, the comments would have to be so flagrant and ill-intentioned that they leave an enduring prejudice that could not have been cured by an admonition. The comments made by the State were neither flagrant and ill intentioned, nor did they leave an enduring prejudice.

In State v. Wright, 76 Wn. App. 811, 888 P.2d 1214 (1995), the court held:

Where, as here, the parties present the jury with conflicting versions of the facts and credibility of witnesses is a central issue, there is nothing misleading or unfair in stating the obvious: that if the jury accepts one version of the facts, it must necessarily reject the other.

Id. at 825 (internal footnotes omitted).

The court stated that it was prosecutorial misconduct for the State to argue that in order to believe the defendant, a jury must find that the State's witnesses are lying. Id. at 826. In the present case, the State did not argue to the jury that in order to believe the defendant, they must find that the police officers are liars. The State did not tell the jury that in order to believe the officers, they must find that the defendant is a liar. The State merely presented argument to the jury as to why the officers' testimony was credible and logical. The State did not tell the jury that in order to accept one version of events—the defendant's or the officers—that they must also necessarily reject the other, although such argument would have been permissible under Wright. Such dilemma is obvious when there is testimony in direct contradiction to another. In this case, Officer Hamilton testified that the defendant exited his vehicle and made statements to him, the defendant testified that he never got out of his car. Such testimony is in direct contradiction to each other.

It is not misconduct for a prosecutor to make arguments regarding a witnesses' veracity that are based on inferences from the evidence. See State v. Rivers, 96 Wn. App. 672, 674-675, 981 P.2d 16 (1999). The State

merely presented argument as to why Officer Hamilton's testimony made sense. The State was well within the wide latitude afforded to prosecutors in closing argument. See, State v. Hoffman, 116 Wn.2d 51, 95, 804 P.2d 577 (1991). Moreover, the jury was instructed that they are the sole judges of credibility, and the jury is presumed to follow that instruction. CP 42-66; State v. Swan, 114 Wn.2d 613, 662, 790 P.2d 610 (1990).

The defendant also asserts that the argument made by the State was a personal opinion regarding the officers' credibility. Brief of Appellant at page 20-21. The State's argument, while inartful, was not a personal opinion regarding officer testimony. Rather, when read in context, it was clear that the State was attempting to argue that it would not make sense for the officers to fabricate their testimony because they did not like the defendant. The State did not argue that the officers were honest and credible, and did not argue that he personally believed them, and therefore the jury should believe them. The argument by the State was, at best, innocuous, and cannot be said to be flagrant and ill-intentioned.

The second comment that the defendant asserts was misconduct was the comment by the State that the defendant intended to deliver the cocaine to community members. Brief of Appellant at page 21. In the present case, the State did not ask the jury to "send a message" to drug dealers or to punish all drug dealers by voting guilty. Rather, the State argued that the evidence supported the charged crime—that the defendant intended to deliver the cocaine in his possession to someone else. The

argument was not a call to protect community values or preserve civil order, but rather a discussion about the elements of the crime of unlawful possession of a controlled substance with the intent to deliver. The statement was proper argument as to what the defendant was intending to do with the drugs in his possession.

The defendant cannot establish that the comments were flagrant and ill-intentioned, or that they resulted in an enduring prejudice that could not have been cured by an admonition. Finally, there was no ineffective assistance of counsel in failing to object to the State's comments. As argued above, the State's comments were entirely proper, and any objection would have been properly overruled.

4. ANY POTENTIAL ERROR ALLEGED BY THE DEFENDANT IN THE CALCULATION OF HIS OFFENDER SCORE IS HARMLESS BECAUSE, IF HIS ARGUMENT IS ACCEPTED, THE DEFENDANT'S OFFENDER SCORE WOULD BE 11, AND HIS STANDARD RANGE WOULD BE THE SAME, AND THE DEFENDANT DOES NOT HAVE A SUFFICIENT RECORD ON WHICH TO ALLEGE THAT ANY OF HIS PRIOR CONVICTIONS HAVE WASHED OUT BECAUSE HE CANNOT ESTABLISH THAT HE REMAINED IN THE COMMUNITY CRIME FREE FOR AT LEAST FIVE YEARS.

The defendant asserts that several of his convictions may fall within a "wash out" period based on his criminal history. Brief of Appellant at page 23. First, as the defendant acknowledges, if he is correct that three of his prior convictions wash, it would result in a

reduction in his offender score from 15 to 11. Brief of Appellant at page 26. Because the defendant received a standard range sentence, and his standard range would not change, any error in his offender score calculation would be harmless.

Second, the record is insufficient to determine if any of the defendant's convictions wash out. The defendant asserts that the record is void of any convictions between 1990 and 1998, and therefore, the class "C" felonies wash out. Brief of Appellant at page 23-24. The defendant, however, cannot establish that he was "crime free" in the community for a total of at least five years. RCW 9.94A.525. The record below does not indicate when the defendant was released on any of his sentences.

Therefore, the defendant cannot establish that he was in the community for any significant period of time. Moreover, the record is silent as to whether the defendant obtained any probation violations on his prior convictions, which would also restart the time for being crime free in the community.

The defendant simply cannot establish that any of his prior convictions fall within the wash out provision. If the defendant can establish that he was, in fact, in the community crime free for at least five years with no probation violations or misdemeanor violations, the defendant can pursue such a claim as a personal restraint petition. Based on the record before this court, however, the defendant cannot establish when he was released from custody on his charges and, therefore, cannot establish that he was in the community for at least five years. Based on

the fact that the defendant cannot support his claim, and the fact that his requested change in his offender score would not result in a change to the defendant's standard range, the defendant's claim is without merit.

5. THE STATE CONCEDES THAT THE TRIAL COURT ERRED IN IMPOSING TWO SEPARATE \$500 PENALTY ASSESSMENTS FOR CONVICTIONS THAT AROSE OUT OF THE SAME CAUSE NUMBER, AND THIS COURT SHOULD REMAND FOR CORRECTION OF THE JUDGEMENT AND SENTENCE ON THE MISDEMEANOR CONVICTION.

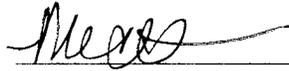
The defendant correctly asserts that RCW 7.68.035 authorizes the imposition of one \$500 penalty assessment "for each case or cause of action." It appears that the separate judgment and sentences for the felony conviction and the misdemeanor conviction both have separate \$500 penalty assessments included. The State agrees that this court should remand for correction of the misdemeanor judgment, and sentence to delete the \$500 penalty assessment on that conviction, while it should remain on the felony conviction.

D. CONCLUSION.

For the above reasons, the State respectfully requests that the defendant's convictions be affirmed, and that this court remand for deletion of one of the imposed penalty assessments only.

DATED: December 20, 2007.

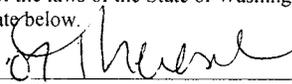
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

12.21.07 
Date Signature

