

Court of Appeals No. 37009-3-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,

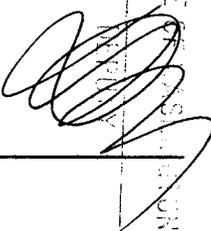
Plaintiff/Respondent,

v.

JORGE LUIS AVILA-NAVARRO,

Defendant/Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____



BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 06-1-05589-8
The Honorable Stephanie A. Arend, Presiding Judge**

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A. ASSIGNMENTS OF ERROR

1. The trial court committed reversible error when it admitted Cristi Godfrey's statements that implicated Mr. Navarro through Deputy Shaffer.

2. If Mr. Navarro's counsel opened the door to the inadmissible testimony then he was denied the effective assistance of counsel.

3. Findings and Conclusions on Motions in Limine were filed on December 14, 2007. To the extent the written findings and conclusions contradict the trial court's oral rulings appellant assigns error. Specifically, error is assigned to "Reasons for Admissibility of the Evidence" Numbers one (1) and three (3). The trial court plainly allowed testimony concerning Cristi Godfrey's statements to Deputy Shaffer only under the "open door" theory.

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where, during trial, the court determined that Cristi Godfrey's statements to Deputy Shaffer were were inadmissible hearsay and violated Crawford, did the court then improperly admit Ms. Godfrey's statements under the theory that defense counsel had opened the door

to such questions during cross-examination? (Assignment of Error Number One.)

2. Assuming defense counsel opened the door to the improper statements of Cristi Godfrey, was Mr. Navarro denied the effective assistance of counsel? (Assignment of Error Number Two.)

B. STATEMENT OF THE CASE

1. *Procedural History*

On November 28, 2006, the defendant/appellant, Jorge Luis Avila Navarro, was charged by Information with two counts of unlawful delivery of heroin pursuant to RCW 69.50.401 (1)(2)(a). CP 1-2. Mr. Navarro was convicted by jury verdicts as charged on November 9, 2007. CP 53-54; RP 11-09-07, 2.¹ On November 21, 2007, the trial court imposed the low end of Mr. Navarro's presumptive range of twelve (12) months plus one (1) day on each count concurrently. CP 58-70. Mr. Navarro had no prior criminal history. CP 55-57. A timely Notice of Appeal was filed on November

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The Verbatim Report of Proceedings are not all numbered. The VRPs will, therefore, be referenced by date and there page number.

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28, 2007. CP 73-86.

2. *Factual Summary*

The charges of unlawful delivery of heroin against Mr. Navarro arose as the result of two separate controlled heroin buys executed by confidential informant (hereinafter referred to as C.I.) Terry Simmons that occurred on October 10, 2006, and November 14, 2006. Mr. Simmons purchased the heroin from his targeted seller, Cristi Godfrey, on both occasions. The quantity of heroin purchased was 1.2 grams and 2.5 grams respectively. RP 11-08-07 252, 258. The State's theory of the case was that Ms. Godfrey obtained the heroin to sell to the C.I. from Mr. Navarro. The jury was instructed on accomplice liability (Jury Instruction Number 11). CP 34-52.

The C.I. was working pursuant to a contract with Pierce County Sheriffs Department whereby he agreed to perform controlled drug purchases from targeted persons in exchange for a sentencing reduction. RP 11-07-07, 185. The C.I.'s sentence for two drug delivery convictions was reduced from sixty (60) months to credit for time served of four months. RP 11-8-07 215.

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On *October 10, 2006*, the C.I. arrived at Cristi Godfrey's residence to make the heroin purchase. A few people were already there smoking crack. Ms. Godfrey was also smoking crack. RP 11-08-07 210-212. Ms. Godfrey used the C.I.'s cell phone to call somebody. The C.I. gave Ms. Godfrey the recorded buy money. About a half an hour later a man arrived. RP 11-07-07 189. The man and Ms. Godfrey went into the bedroom for about twenty seconds. The man left quickly thereafter. Ms. Godfrey closed the door behind him and gave the C.I. the drugs. RP 11-07-08 190. The C.I. identified the man as Mr. Navarro.

Meanwhile, Pierce County Sheriffs were surveilling outside Ms. Godfrey's residence. Deputy Jones identified Mr. Navarro as the man who went inside Ms. Godfrey's residence while the C.I. was there. RP 11-07-07 158. He noted the license number of the Nissan pickup truck the man who entered Ms. Godfrey's residence was driving: A06682X. RP 11-7-07 156, 158. Deputy Jones took a photograph of the suspected driver of the Nissan, which was admitted at trial. RP 11-07-07 96; 160-161.

Deputy Shaffer, who was also present and observing from a

distance on October 10, 2006, was supervising the C.I. in targeting Ms. Godfrey for the controlled buys. RP 11-07-07 75. He and Detective Hickman had searched, wired, and dropped the C.I. off at the target location at about 11:15 a.m. RP 11-07-07 79,83. Deputy Shaffer also identified Mr. Navarro as the man he saw arriving in the Nissan truck at Ms. Godfrey's residence on October 10, 2006. RP 11-07-07 84.

On *November 14, 2006*, the C.I. again went to Cristi Godfrey's residence to purchase heroin for the Pierce County Sheriff's Office. Upon arriving, the C.I. observed a female inside the residence smoking crack with Ms. Godfrey. RP 11-07-07 212-213. The C.I. heard Ms. Godfrey place a phone call. A vehicle arrived shortly thereafter, although the C.I. did not recall anything about the car, nor did he see anyone inside it. RP 11-08-07 206-207. Ms. Godfrey went outside and made contact with a person or persons inside the vehicle. About 10 seconds later she returned and gave the C.I. the heroin he had paid her for. RP 11-08-07 206-208.

Deputy Shaffer supervised the C.I.'s controlled buy on November 14, 2006. RP 11-07-07 105. From his observation point,

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however, he was unable to see the target residence or anyone inside the vehicle. RP 11-07-07 115.

Deputy Jones observed a “dark, smaller car like a Civic type of vehicle or a Saturn type of vehicle” arrive at the residence at about 5:25 p.m. RP 11-07-07 164-165. Through his binoculars he got the license number of the small car: 955 UWP. RP 11-07-07 164-166. He saw the “female target,” identified as Cristi, exit the residence and contact the car for less than a minute. RP 11-07-07 164-167. Deputy Jones testified that it was too dark to see the person or persons inside the vehicle. Additionally, the vehicle’s windows were darkened. RP 11-07-07 166.

Deputy Simmelink-Lovely, who was also involved in the November 14,2006 operation, testified that she followed the Saturn car for a brief period after it left Ms. Godfrey’s residence, and was able to see the driver at one point. She described the driver an Hispanic male. RP 11-08-07. Deputy Simmelink-Lovely did not recognize the driver but was later shown a single photography of Mr. Navarro by Deputy Shaffer which she identified as the driver. RP 11-08-07 271.

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Certified copies of the vehicle registration showed that Mr. Navarro was the registered owner of the vehicle seen at Cristi Godfrey's residence on October 10, 2006, but was not the registered owner of the vehicle seen at Cristi Godfrey's residence on November 14, 2006. RP 11-08-07 280, 322.

3. *Cristi Godfrey's Statements*

Prior to the trial's inception defense counsel moved to exclude any and all statements made by Cristi Godfrey to either the C.I. or detective Shaffer. Ms. Godfrey was not subpoenaed by either party and would not be testifying at trial. The trial court ruled that the motion was premature and should be revisited outside the presence of the jury prior to the admission of such statements. The court also ruled that the State might be able to introduce Ms. Godfrey's statements if it could first present evidence that Ms. Godfrey and Mr. Navarro were engaged in a conspiracy. The court reasoned that the furtherance of a conspiracy exception would satisfy the Rules of

Evidence and not violate Crawford.² 11-06-07 29-30.³

During the redirect examination of Deputy Shaffer the State queried the deputy concerning statements made by Ms. Godfrey to him when he served a search warrant upon her home on November 27, 2006. The State did not argue that the furtherance of a conspiracy exception had been satisfied, but rather asserted that the defense had opened the door to such questions by asking Deputy Shaffer about items found during the execution of the search warrant. RP 11-07-07 137. The court revisited the defense continuing objection to the admission of Cristi Godfrey's statements. RP 11-07-07 136-143. The court ruled that although no conspiracy had been shown at this point defense counsel had opened the door regarding Ms. Godfrey's statements to Deputy Shaffer concerning the items found at her residence pursuant to the search warrant. RP 11-07-07 142-143.

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ER 801 (d)(2); Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed 2d 177 (2004).

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Findings and Conclusions on Motion in Limine were filed on December 14, 2007. CP 93-97.

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Following the court's ruling, Deputy Shaffer proceeded to testify that Ms. Godfrey told him that she was obtaining her heroin from a "Mexican" male who "stopped by" every couple of days. She also said that she had "middled" a few heroin deals with this man in exchange for money. RP 07-07-07 144-145.

During the testimony of the C.I. the defense motion to exclude statements made by Ms. Godfrey to the C.I. was again revisited. The State argued that it had now presented sufficient evidence to show that Ms. Godfrey and Mr. Navarro were co-conspirators and that the statements did not implicate Crawford because they were non-testimonial.⁴ RP 07-07-07 180. The court ruled that the State had adequately shown a conspiracy existed for the October 10, 2006 transaction but not for the November 14, 2006 transaction. RP 07-07-07 180-181.

Following the court's ruling the C.I. testified that during the heroin purchase on October 10, 2006, Cristi Godfrey told him that she

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See also State v. Chambers, 134 Wash.App. 853,142 P.3d 668 (2006).

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had to call her Mexican friend to get the heroin to sell to the C.I. She used the C.I.'s telephone to place a call for "three teeners." RP 11-07-07. 188-189. The audio recording of the C.I.'s wire for the October 10, 2006 purchase was admitted into evidence. RP 11-08-07 228.

D. ARGUMENT

I. MR. NAVARRO'S CONSTITUTIONAL RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS VIOLATED BY THE ADMISSION OF CRISTI GODFREY'S STATEMENTS THROUGH DETECTIVE SHAFFER AND THE TRIAL COURT ERRONEOUSLY PERMITTED SUCH STATEMENTS UNDER THE THEORY THAT DEFENSE COUNSEL HAD OPENED THE DOOR.

The Sixth Amendment's guarantee of confrontation is a procedural requirement of a fair trial. In *Crawford v. Washington*, 541 U.S. 36,60-61,124 S.Ct. 1354,158 L.Ed.2d 177 (2004), the United States Supreme Court overturned its prior rule that an out-of-court statement could be admitted as evidence solely based on whether it fell within a "firmly rooted hearsay exception," or was given under circumstances showing it to be trustworthy. U. S. Const. Amend. 6;

Wash. Const. Art.1, section 22.⁵ Crawford rejected decisional law that equated the confrontation clause analysis with admissibility under hearsay rules. 541 U.S. at 61-63.

The Crawford court reasoned that the Sixth Amendment is not based on evidence's reliability. "It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." 541 U.S. at 68. Crawford "reject[ed]" the view that the reliability-based framework of Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531,65 L.Ed 2d 597 (1980), or the rules of evidence, govern the admissibility of out-of-court statements, ruling:

Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actual prescribes: confrontation.

Id. at 69.

The constitution's absolute prohibition of unfronted out-of-

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The Sixth Amendment grants a defendant the right. "To be confronted with witnesses against him." Likewise, the Washington constitution guarantees an accused the right "to meet the witnesses against him face to face." Wash. Const. Art. 1, section 22.

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court accusations at trial applies without question to statements made to a police officer in the course of an investigation. Crawford, 541 at 68-69.

Confrontational Clause violations are reviewed de novo. State v. Larry, 108 Wn.App. 894,901,34 P.3d 241 (2001).

In Mr. Navarro's case, the trial court correctly concluded that Cristi Godfrey's statements to Deputy Shaffer were inadmissible hearsay under any exception to the hearsay rule or Crawford, but erroneously ruled that defense counsel had opened the door to such statements by questions concerning the items discovered during the search of Ms. Godfrey's residence subsequent to the controlled buy.⁶

During cross-examination defense counsel's questioning concerning the search of Cristi Godfrey's premises was limited to the following:

Q. Was there a time where you did a search warrant on that

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The court noted, and both parties agreed, that any possible conspiracy would have ended by the time Ms. Godfrey's statements were made to Deputy Shaffer. The statements would, therefore, be inadmissible under ER 801 (d)(2). State v. Pierre, 111 Wn. 2d 105,759 P.2d 383 (1998).

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residence at Croft Street?

A. Yes, I did.

Q. And do you recall what you found, if you found any drugs or paraphernalia?

A. I did find narcotics and drug paraphernalia, money.

RP 11-07-07 126.

Defense counsel's questions to Deputy Shaffer concerning the items found cannot reasonably be considered as having opened the door to statements made by Ms. Godfrey that implicated Mr. Navarro as her supplier. At no point did counsel query concerning what was said by Ms. Godfrey in the course of the investigation. Nor was any reference made to where she had obtained the drugs. Moreover, the drugs found in Ms. Godfrey's residence did not include heroin.

The error in admitting Ms. Godfrey's statements through Deputy Shaffer was not harmless as to either count charged by the State. The statements through Deputy Shaffer corroborated the C.I.'s testimony entirely concerning Mr. Navarro's suspected role in both deliveries. Additionally, Deputy Shaffer testified extensively about the

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role of a “middler” in a drug transaction, but was strictly prohibited by the trial court from testifying that Cristi Godfrey described her own role as a “middler” to her “Mexican” drug supplier until the court decided that defense counsel had opened the door. RP 11-07-07 121-122.

Cristi Godfrey’s uncontroverted statements which came in through Deputy Shaffer completed the story for the jury and lent strong corroboration of the C.I.’s veracity. This testimony was particularly harmful in regard to the November 14, 2006 purchase where the evidence was significantly weaker, and where the C.I.’s testimony concerning Ms. Godfrey’s statements was not permitted by the trial court. Mr. Navarro was denied his right to confront Cristi Godfrey. Her statements were inadmissible and defense counsel did not open the door to them.

II. IN THE EVENT THIS COURT DETERMINES THAT DEFENSE COUNSEL OPENED THE DOOR TO ADMITTING THE IMPROPER TESTIMONY OF CRISTI GODFREY THROUGH DETECTIVE SHAFFER, MR. NAVARRO WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

In order to show that he or she received ineffective assistance of counsel, an appellant must show (1) that trial counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness, and (2) that the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2005).

There is a strong presumption that defense counsel's conduct is not deficient, however, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2005). Where a defendant has received ineffective assistance of counsel, the proper remedy is remand for a new trial with new counsel.

There is no question that Mr. Navarro's trial counsel sought to have Mr. Godfrey's statements to Deputy Shaffer excluded. There is also no question that the court intended to prevent such testimony but

for its conclusion that defense counsel herself had opened the door to it.

The prejudice to Mr. Navarro was noted above. Deputy Shaffer's testimony that recounted Ms. Godfrey's statements completed the story for the jury and effectively placed Ms. Godfrey in the role of "middler" and Mr. Navarro in the role of her "supplier." Furthermore, Deputy Shaffer's testimony concerning Ms. Godfrey's statements served to strongly corroborate the otherwise dubious testimony of the C.I. concerning Ms. Godfrey's statements to him. Defense counsel's performance was objectively unreasonable in this regard and resulted in denying Mr. Navarro his constitutional right to the effective assistance of counsel.

E. CONCLUSION

For the reasons stated above, this court should reverse Mr. Navarro's conviction and remand for a retrial.

DATED this 17th day of July, 2008.

Respectfully submitted,



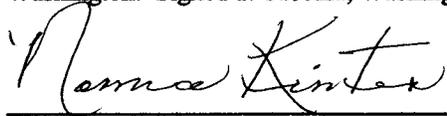
Sheri Arnold
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CERTIFICATE OF SERVICE

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

The undersigned certifies that on July 17, 2008, I delivered in person to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Avenue South, Tacoma, Washington 98402, and by U. S. Mail to Jorge L. Avila-Navarro, 104 106th Street Court South, Tacoma, Washington 98444, true and correct copies of this Opening Brief. 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 July 17, 2008.



Norma Kinter