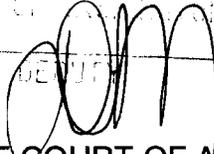


COURT OF APPEALS  
DIVISION TWO

MARCH 19 2019

NO. 40229-7-II

STATE OF WASHINGTON  
BY \_\_\_\_\_



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

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STATE OF WASHINGTON

Respondent

v.

CHRISTEN K. LEE,

Appellant

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BRIEF OF RESPONDENT

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MARK K. ROE  
Prosecuting Attorney

SETH A. FINE  
Deputy Prosecuting Attorney  
Attorney for Respondent

Snohomish County Prosecutor's Office  
3000 Rockefeller Avenue, M/S #504  
Everett, Washington 98201  
Telephone: (425) 388-3333

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## **I. ISSUES**

(1) On cross-examination, defense counsel emphasized a witness's motivation to cooperate with police in order to avoid a lengthy prison sentence. On re-direct, the prosecutor elicited testimony that false information would have jeopardized the witness's ability to obtain a sentence reduction. Did eliciting this testimony constitute improper "vouching" for the witness's credibility?

(2) Evidence showed that the defendant had participated in a conspiracy to launder proceeds of drug transactions. Although the drug transactions had ceased, evidence showed that the parties contemplated further financial transactions involving the proceeds. In a recorded conversation with a police informant, one of the conspirators tried to persuade the informant to buy some of these proceeds. Did the trial court abuse its discretion in admitting this conversation as a co-conspirator statement?

## **II. STATEMENT OF THE CASE**

In 2001, Darrin Rogers was a marijuana dealer. He was buying marijuana from several suppliers and selling it to several customers. 2 RP 119-20. At some point, Rogers provided starter plants to Don Tyler so that Tyler could grow marijuana for him.

Thereafter, Rogers met with Tyler once a month or once every couple of months. He bought between one and three pounds of marijuana each time. Rogers bought marijuana from Tyler approximately 10 times. 2 RP 125-28.

In December 2000, the defendant, Christen Lee, bought a house in Ocean Shores. 3 RP 366-67. She resided there with Tyler. 2 R 144-45. Power records showed that this house had high usage from 2001 to April, 2006. The usage level was consistent with a marijuana grow operation. 2 RP 195-97.

During this period, records from the Employment Security Department do not show any employment earnings for either Tyler or the defendant. 1 RP 44-45. The defendant was receiving disability payments from Social Security and the Department of Labor and Industries. 1 RP 81. This money was deposited into her bank account. Most of it was left there unused. 3 RP 357. Between 2003 and 2005, most of the defendant's expenses were paid in cash. Starting in 2006, the defendant began paying her expenses from her bank account. 3 RP 370. Between 2003 and 2005, known expenditures by the Tyler-Lee household exceeded their known income by a total of almost \$130,000. 3 RP 412-16.

In March, 2004, Tyler negotiated the purchase of a vacant lot in Ocean Shores from Patrick Curry. When the time came to complete the transaction, the defendant met with Curry to complete the paperwork. She paid the \$15,000 purchase price with money orders and cashier's checks. 2 RP 107-11.

In October, 2004, police arrested Rogers. He agreed to provide information about people he knew who were involved with drug trafficking. 1 RP 19-20. At police direction, Rogers met with Tyler at the house in Ocean Shores. The house had an area set up for growing marijuana, but it was not in use at the time. During this meeting, Rogers obtained a "mother plant" from Tyler – one that could be used to provide cuttings from which marijuana could be grown. 2 RP 131-39.

On October 19, 2006, Rogers again met Tyler at the Ocean Shores house. The ensuing conversation was recorded. During this meeting, Tyler tried to persuade Rogers to buy the house at a premium price. The defendant was present for part of the conversation. Tyler told her that he was talking to Rogers about selling the house as a "business." She responded, "Mmm hmm." Ex. 36; CP 171-208, attachment A, B.

On December 7, 2006, police served a search warrant at the Ocean Shores home. Part of the house was set up for growing marijuana, but nothing was being grown at the time. 2 RP 249-62. In a shop attached to the house, police found \$58,000 in cash. 2 RP 406; 3 RP 333-33.

The defendant was charged with two counts of money laundering. Count 1 related to payments made on the house. Count 2 involved the purchase of the vacant lot. CP 27-28. A jury found her guilty as charged. CP 103-04.

### **III. ARGUMENT**

#### **A. THE PROSECUTOR DID NOT IMPROPERLY “VOUCH” FOR A WITNESS’S CREDIBILITY.**

##### **1. After The Defense Uses A Witness’s Agreement With Police To Attack The Witness’s Credibility, The Prosecutor May Rehabilitate The Witness By Showing That The Agreement Obligated The Witness To Provide Truthful Information.**

The defendant claims that the prosecutor improperly “vouched” for Rogers’s testimony.

Improper vouching generally occurs (1) if the prosecutor expresses his or her personal belief as to the veracity of the witness or (2) the prosecutor indicates that evidence not presented at trial supports the witness’s testimony.

State v. Ish, 170 Wn.2d 189, 196 ¶ 15, 241 P.3d 389 (2010). If no objection was raised at trial, “the defendant must show that the

alleged misconduct was so flagrant and ill-intentioned that no curative instruction would have obviated the prejudice it engendered.” State v. Coleman, 155 Wn. App. 951, 956-67 ¶ 8, 231 P.3d 212 (2010), review denied, 170 Wn.2d 1016 (2011).

Under some circumstances, introducing evidence of a witness’s agreement to testify truthfully may rise to the level of improper vouching. The rules governing such evidence are explained in Ish:

[E]vidence that a witness has agreed to testify truthfully generally has little probative value and should not be admitted as part of the State’s case in chief. . .

A defendant may, however, impeach a witness on cross-examination by referencing any agreements or promises made by the State in exchange for the witness’s testimony. During such cross-examination, the agreement may be marked as an exhibit, but not necessarily admitted, and relevant portions may be disclosed to the jury. If the agreement contains provisions requiring the witness to give truthful testimony, the State is entitled to point out this fact on redirect if the defendant has previously attacked the witness’s credibility. Courts should carefully scrutinize such agreements and exclude language that is not relevant to the defendant’s impeachment evidence or tends to vouch for the witness’s testimony. While the State may ask the witness about the terms of the agreement on redirect once the defendant has opened the door, prosecutors must not be allowed to comment on the evidence, or reference facts outside of the record, that implies they are able to

independently verify that the witness is in fact complying with the agreement.

Ish, 170 Wn.2d at 198-99 ¶¶ 20-21.

These rules were followed in the present case. On direct examination, the prosecutor did not elicit any testimony that Rogers had agreed to testify truthfully. 2 RP 123-25 (testimony on direct examination concerning cooperation agreement). Defense counsel cross-examined the witness extensively about this agreement. This cross-examination emphasized the severe sentence that the witness was facing and the large number of people that he provided information about. 2 RP 147-51. Counsel then emphasized how long it took the witness to provide information about Don Tyler:

Q So in fact when you met with them first it was in December of '03<sup>1</sup>, but you didn't really get to the point where you were giving them information about Don Tyler for a couple of years –

A Right.

Q – because you were focusing on bigger fish in the ocean, right?

A Yes.

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<sup>1</sup> Rogers appears to have been confused about the dates. On direct-examination, he testified that he was arrested in 2004. 2 RP 115. Police likewise testified that Rogers was arrested in October, 2004.1 RP 19.

Q Okay. So it's a couple of years after you first started giving them information that you're talking in detail about Don Tyler.

...

Q [D]o you recall how old your information about Don Tyler was? Is it fair to say that it was years, four or five years old by the time you got around to giving them information about Don Tyler and they asked – they told you to follow up on it?

A It might have been a couple years, but I don't think it was much older than that.

A A couple of years. So you told us that it was probably a couple of years in your almost daily meetings with the drug task force before you got around to talking any detail about Don Tyler, right?

A Right.

2 RP 151-52. Four times defense counsel repeated that it took “a couple of years” for the witness to provide information about Tyler. Counsel clearly wanted the jury to infer that the witness, under pressure to provide information about more people, provided exaggerated information.

To refute this inference, the prosecutor was entitled to explore the witness's motivation further. His promise was not merely to provide information and testify, but to do so truthfully. He was aware that his information would be investigated. He knew that any false information would jeopardize his bargain. 2 RP 169-

71. Consequently, he had no motivation to provide false information. This was a proper refutation of the inferences raised by cross-examination.

Under lsh, the prosecutor can offer the agreement itself into evidence, but the court should scrutinize it and exclude irrelevant portions. lsh, 170 Wn.2d at 199 ¶ 21. Here, the prosecutor did not offer the agreement. Defense counsel raised no objection to the testimony concerning it. Consequently, the court had no occasion to consider the possibility of partial exclusion.

lsh also warns that prosecutors may not reference facts outside the record suggesting that they are able to independently verify a witness's compliance with the agreement. Id. Here, the prosecutor's questions went solely to the witness's beliefs and expectations – not any investigation that may have been conducted. 2 RP 169-71. In closing argument, the prosecutor briefly argued that the agreement gave the witness an incentive to be truthful in his testimony. 4 RP 520. The testimony and argument on this subject were proper rebuttal of the inferences raised by defense cross-examination.

The situation in the present case is comparable to that in Coleman. There, the State introduced a plea agreement during

*direct* examination of a witness. The agreement included a promise to testify truthfully. The defense did not object to the introduction of the agreement. Coleman, 155 Wn. App. at 956 ¶ 7. The court held that introduction of the “testify truthfully” provision did not constitute improper “vouching.” Although it was improper to introduce the agreement before the witness’s credibility was attacked, that error was not flagrant or prejudicial, so as to allow it to be raised for the first time on appeal. Rather, the error was harmless because “the agreement was not prejudicial and was admissible for rehabilitation.” Id. at 959 ¶¶ 15-16.

In the present case, the error identified in Coleman did not occur – testimony concerning the agreement was not introduced until the witness’s credibility had been attacked. As in Coleman, testimony concerning a “testify truthfully” agreement was proper to rehabilitate the witness. If there was any error at all, it was not so flagrant or prejudicial that it can be challenged for the first time on appeal.

The defendant attempts to rely on State v. Green, 119 Wn. App. 15, 79 P.3d 460 (2003), review denied, 151 Wn.2d 1035, cert. denied, 543 U.S. 1023 (2004). There again, a plea agreement was introduced on direct examination. The court held that it was error to

allow the agreement into evidence before the witness's credibility was attacked. Id. at 23-24. The error was, however, harmless because the agreement would have been admissible on re-direct. Id. at 25.

In discussing the admissibility of the agreement, the court suggested that portions of the agreement should have been redacted:

While the immunity agreement was admissible after [the witness's] credibility had been attacked, we agree that the language that the intent of the agreement was to "secure the true and accurate testimony" and the provision that [the witness] "testify truthfully" should have been redacted if such a request had been made. These provisions were prejudicial and improperly vouched for [the witness's] credibility.

Id. at 24. In the present case as in Green, no request for redaction was made. Nothing in Green suggests that the court is required to redact an agreement absent any request.

In any event, Green does not preclude all evidence of agreements to "testify truthfully." As the Coleman court pointed out, "the requirement that the witness testify truthfully [in Green] was admitted in the context that the State knew the witness's testimony and entered the agreement to secure it." Outside of this context, the evidence is admissible for rehabilitation. Coleman, 155 Wn.

App. at 959 ¶¶ 14-15. In the present case, the agreement was made before the witness provided any information. The agreement cannot be reasonably construed as vouching in advance for the accuracy of information and testify that the witness would provide years later. There was no prosecutorial misconduct at all – let alone misconduct that was so flagrant and prejudicial that it can be raised for the first time on appeal.

**2. Since The Witness Had No Direct Knowledge Concerning The Facts Establishing The Defendant’s Guilt, Any “Vouching” That May Have Occurred Was Not Prejudicial.**

Even if testimony about the agreement was improper, this would not warrant reversal without a showing of prejudice.

To prevail on a claim of prosecutorial misconduct, the defendant bears the burden of showing that the comments were improper and that they were prejudicial. In order to prove the conduct was prejudicial, the defendant must prove there is a substantial likelihood the misconduct affected the jury’s verdict.

Ish, 170 Wn.2d at 200 ¶ 23 (citations omitted). The defendant here cannot meet this burden.

The witness Rogers had no direct knowledge concerning the defendant’s involvement. All of his drug transactions had been with Tyler, not the defendant. 2 RP 125-32. The existence of these transactions was corroborated by his recorded conversation with

Tyler. Ex. 36. The defense never disputed that Tyler had sold marijuana to Rogers. Rather, they claimed that he had bought the marijuana from others rather than growing it himself. 4 RP 555-56, 560-61. Rogers had never seen Tyler growing marijuana. 2 RP 153. He had no idea where Tyler got the marijuana from, apart from what Tyler had told him. On cross-examination, Rogers agreed that Tyler was a “storyteller” who had told some “interesting tales,” which may or may not have been true. 2 RP 156.

As to the critical issues in this case, Rogers’s credibility was not in issue. Tyler’s credibility was – but the alleged “vouching” had nothing to do with Tyler. Consequently, the defendant has not carried her burden of proving that any prosecutorial misconduct was prejudicial. This being so, there is no grounds for reversal of the convictions.

**3. Defense Counsel Was Not Ineffective For Failing To Object To “Vouching,” Since Counsel’s Actions Had A Valid Tactical Basis And An Objection Would Not Have Affected The Outcome Of The Case.**

The defendant also claims that trial counsel was ineffective for failing to object to the purported “vouching.” To establish ineffective assistance, the defendant must show that (1) her attorney’s performance was deficient and (2) the deficient

performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). She cannot make either of these showings.

To being with, counsel had a valid tactical basis for refusing to object. In assessing the effectiveness of counsel, the court must make every effort to eliminate the distorting effects of hindsight. Strickland, 466 U.S. at 689. At the time of trial in this case, Green had been decided, but neither Ish nor Coleman. As discussed above, the relevant provision of the plea agreement in Green was significantly different than the agreement in the present case. Counsel could have reasonably concluded that an objection would be unavailing. Counsel could also have been concerned that an objection might antagonize the jurors or underscore the objectionable material in their minds. See Bussard v. Lockhart, 32 F.3d 322, 324 (8th Cir. 1994). Since there were valid tactical reasons why counsel might not have objected, the lack of objection cannot be considered deficient.

Even if deficient performance could be shown, the defendant has not shown that this resulted in prejudice. To establish prejudice, "[t]he defendant must show that there is a reasonable

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. As discussed above, any objection to the alleged "vouching" would not have been sustained. Furthermore, there is no reason to believe that the exclusion of this evidence would have changed the outcome of the proceeding. The defendant has not shown ineffective assistance of counsel.

**B. IN VIEW OF EVIDENCE ESTABLISHING AN ONGOING CONSPIRACY TO LAUNDER DRUG PROCEEDS, THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING EVIDENCE OF A CO-CONSPIRATORS EFFORTS TO SELL SOME OF THOSE PROCEEDS.**

Finally, the defendant claims that a conversation between Rogers and Tyler was improperly admitted under ER 801(d)(2)(v). That rule allows admission of "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy." Before admitting statements under this rule, "the trial judge must find that there is evidence, other than the hearsay statements, that shows that the defendants were members of a conspiracy." This determination is made by a preponderance of the evidence. State v. Guloy, 104 Wn.2d 412, 420, 705 P.2d 1182 (1985).

For purposes of this rule, "conspiracy" means "an agreement made by two or more persons confederating to do an unlawful act."

State v. Halley, 77 Wn. App. 149, 154, 890 P.2d 511 (1995). A conspiracy can be shown by circumstantial evidence. The trial court's decision to admit the statements is reviewed for abuse of discretion. State v. Dictado, 102 Wn.2d 277, 284, 687 P.2d 172 (1984).

The defendant claims that to obtain admission of the statements, the State must also show the commission of a substantial step. This is an element of the *crime* of conspiracy under RCW 9A.28.040. It is not clear whether this element applies to the crime of conspiracy to violate the Uniform Controlled Substances Act under RCW 69.50.407. Compare State v. Casarez-Gastellum, 48 Wn. App. 112, 118 P.3d 303 (1987) (Division Three) (RCW 69.50.407 does not require proof of substantial step), and State v. Hawthorne, 48 Wn. App. 23, 26-27, 737 P.2d 717 (1987) (Division One) (same), with State v. Pineda-Pineda, 154 Wn. App. 653, 666-68, 226 P.3d 164 (2010) (Division One) (overruling Hawthorne, RCW 69.50.407 does require proof of substantial step).

This question need not, however, be resolved in the present case. The co-conspirator exception to the hearsay rule is not synonymous with the crime of conspiracy. Halley, 77 Wn. App.

at 153; United States v. Coe, 718 F.2d 830, 835 (7<sup>th</sup> Cir. 1983). The hearsay exception does not require proof of elements of the crime such as an “overt act.” United States v. Gil, 604 F.2d 546, 549 (7<sup>th</sup> Cir. 1979); United States v. Trowery, 542 F.2d 623, 626 (3<sup>rd</sup> Cir. 1976), cert. denied, 429 U.S. 1104 (1977). (The “overt act” element in other jurisdictions is similar to the “substantial step” element in Washington. See State v. Dent, 123 Wn.2d 467, 475-77, 869 P.2d 392 (1994).)

Here, the State provided ample evidence of the defendant’s participation in a conspiracy with Tyler. Rogers testified that he bought marijuana from Tyler. 2 RP 128. The house that the defendant shared with Tyler was set up for growing marijuana. 2 RP 132, 249-62. This house was owned by the defendant. 3 RP 366-67. Expert testimony indicated that a marijuana grow operation of the type observed by police could yield \$150,000 a year. 2 RP 198. During the period 2003-2005, known expenditures from the Tyler-Lee household exceeded their known income by a total of almost \$130,000. 3 RP 412-16. Almost all of the mortgage payments on the defendant’s house were paid in cash. 3 RP 369-70. Tyler negotiated the purchase of real property. The defendant completed this transaction, paying \$15,000 with money orders and

cashiers' checks. 2 RP 107-11. These facts support the trial court's finding that the defendant conspired with Tyler to sell marijuana and launder the resulting funds. 3 RP 318-19.

The defendant contends that the conspiracy ended when Tyler stopped growing and selling marijuana.

Once a conspiracy is established ..., it is presumed to continue unless or until the defendant shows that it was terminated or he withdrew from it. A mere cessation of activity in furtherance of the conspiracy is insufficient. The defendant must show affirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonable calculated in a manner reasonably calculated to reach his co-conspirators.

United States v. Walker, 796 F.2d 43, 49 (4<sup>th</sup> Cir. 1986) (citations omitted).

In the present case, the conspiracy was not simply to grow and sell marijuana, but to launder the proceeds. This conspiracy was not concluded. In the shop attached to the defendant's house, police found \$58,000 in cash. 2 RP 406; 3 RP 333-33. The trial court could infer that this money was proceeds of drug sales and that it was intended for ultimate expenditure or investment. Any such transaction would constitute money laundering under RCW 9A.83.020(1)(a).

The continuing existence of the conspiracy was also demonstrated by the defendant's own participation in the challenged conversation. Tyler told the defendant that he was talking to Rogers about selling the house as a "business." She responded in the affirmative. Ex. 36. Of course, the defendant's own statements are admissible without regard to the co-conspirator exception. ER 801(d)(2)(i). This applies equally to "a statement of which the [defendant] has manifested an adoption or belief in its truth." ER 801(d)(2)(ii). Since the house represented proceeds of drug transactions, a sale of it would be an act of money laundering. The defendant's agreement to this sale showed her continued participation in the conspiracy. The evidence thus supports the trial court's finding that the challenged statement was made in the course and furtherance of a conspiracy involving the defendant. The court did not abuse its discretion in admitting the statement.

**IV. CONCLUSION**

The judgment and sentence should be affirmed.

Respectfully submitted on March 25, 2011.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
SETH A. FINE, #10937  
Deputy Prosecuting Attorney  
Attorney for Respondent

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

THE STATE OF WASHINGTON,  Respondent,  v.  CHRISTEN K. LEE,  Appellant.
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No. 40229-7-II

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 25<sup>th</sup> day of March, 2011, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION II  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402-4454

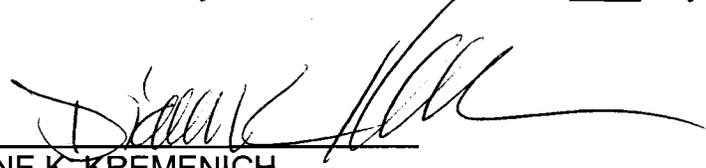
ROBERT M. QUILLAN  
ATTORNEY AT LAW  
2633 PARKMONT LANE S.W., SUITE A  
OLYMPIA, WA 98502-5793

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the Appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 25<sup>th</sup> day of March, 2011.

A handwritten signature in black ink, appearing to read "Diane K. Kremenich", written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit