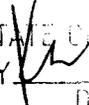


COURT OF APPEALS
DIVISION II

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NO. 40264-5-II

STATE OF WASHINGTON
BY  DEPUTY

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent

v.

KENNETH D. GROSS, Appellant

Appeal from the Superior Court of Pierce County
The Honorable JAMES ORLANDO, DEPARTMENT NO. 1
Pierce County Superior Court Cause No. 07-1-06240-0

BRIEF OF APPELLANT

By:

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A. ASSIGNMENTS OF ERROR:

1. This court must reverse the defendant's convictions where he received ineffective assistance of counsel.

2. This court must reverse the defendant's convictions for prosecutorial misconduct where the prosecutor sought to convict the defendant on the basis of inadmissible evidence.

3. This court should reverse the defendant's conviction where State failed to enter findings of fact and conclusions of law essential to this court's review of the case.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR:

1. A criminal defendant has a right to effective assistance of counsel. When the defendant is denied that fundamental right, he is entitled to relief from the court.

2. Effective assistance of counsel requires trial counsel to vigorously object to the admission of unfairly prejudicial evidence.

3. Effective assistance of counsel requires counsel to prepare his case and to subpoena necessary witnesses for the defense case.

4. The prosecutor is a minister of justice whose duties require him to exercise fairness in the prosecution of the accused.

5. The prosecutor violates his obligations in the criminal justice system when he seeks to convict a defendant on inadmissible evidence.

6. The prosecutor's failure to present findings of fact and conclusions of law necessary to appeal mandate reversal.

7. A criminal defendant is denied his constitutional right to appeal when the State fails to perfect the record with findings of fact and conclusions of law necessary for the defendant's appeal and thus for appellate review.

C. STATEMENT OF THE CASE:

1. Procedure:

On November 9, 2009 this case was called for trial before Pierce County Superior Court. Department One, the Honorable James Orlando presiding. RP I 1.

After argument regarding the joinder of several various cases. The court affirmed that the cases would be joined. RP I 11. The State subsequently filed an amended information after the consolidated this case with another case against the defendant. The amended information thus set forth the charges for trial. CP 203-205.

On December 10, 2009, the court convened a *CrR 3.5*¹ hearing. R1
19-20

The State presented testimony from Lakewood Police Department
Officer Sean Conlon. RP I 20 *et seq.*

Conlon testified that on January 10, 2009, he participated in the
defendant's arrest outside his residence at 5421 South Warner Street,
Tacoma. RP I 22-23, 28. Conlon advised the defendant of his
constitutional rights and the defendant waived those rights. RP I 24-25.
The defendant stated that he believed the officer was there related to some
threats made against the officer's confidential informant Kenny Dussault
(CI). RP I 25. The defendant admitted stating that he was going to kill the
CI. RP I 26. This statement was made at the casino. RP I 26. The
defendant also stated that he threatened the CI when he told the CI's
girlfriend that he was aware that Kenny was a snitch and that he would kill
him. RP I 26. On another date the defendant drove by the snitch's house
and stated that he would kill him. RP I 26. On yet another date, the
defendant slashed the CI's tires and wrote "snitch" on the side of his car.
The CI was in his car during on that occasion. RP I 26.

CrR 3.5(a), "[w]hen a statement of the accused is to be offered in evidence, the judge at the time of
the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose
of determining whether the statement is admissible."

Conlon stated that with regard to the incident at the casino, the defendant stated that he “had made a threat but that he did not mean it that way.” RP I 26-27. The defendant acknowledged that he knew that he was not supposed to have contact with Dickjose and the CI. RP I 27. The defendant also stated that he had purchased methamphetamine from the Dickjose to sell to the CI. RP I 27.

During the initial encounter between the police and Gross, the police officer asked Gross to work for him as an informant. RP I 32. Conlon asked Gross if he would testify against Dickjose and Gross refused. RP I 33.

Defense counsel called the defendant to testify at the CrR 3.5 hearing. RP I 36 et seq. Defense counsel did not ask a single question about whether the police advised the defendant about his constitutional rights and/or whether the defendant understood his rights. *Supra*. Instead defense counsel previewed the defendant’s trial testimony for the State. RP I 46.

After the evidence, the State argued for the admission of the defendant’s statement to police. RP I 47. Without making any argument defense counsel concurred in the admission of those statements. RP I 47. The trial court noted that the defendant was “obviously entitled to an instruction that the jury should consider any alleged statements and the

circumstances under which they are made, which is a pattern instruction.”

RP I 48.

On the day of opening statements, the prosecutor informed the court and defense counsel that the State had failed to turn over 130-140 pages of discovery, including photos of vehicles from the Dickjose residence, a videotape of the items found at the Dickjose residence, discovery that previously had been redacted from a controlled buy done with the defendant. RP I 50. In addition, the State had failed to provide informant contracts, information that the CI at one point smoked methamphetamine during one of the controlled buys, as well as a microcassette introduced at a prior hearing. RP I 51.

Defense counsel noted that he had been unable to locate several witnesses. RP I 51. Other than that, defense counsel commented that he did not have a microcassette player and that “I am making a note to myself to bring that cassette player so that we can play it and record it so I can listen to it. There could be some exculpatory evidence there.” RP I 52.

Defense counsel chiefly and repeatedly express concern with how he would handle other motions and cases during the defendant’s trial. RP I 52-53, 195.

The State made an opening statement. RP I 54. Defense counsel reserved opening. RP I 53.

During Officer Conlon's testimony, the prosecutor elicited testimony that the defendant was merely the middleman in the transactions. RP I 117. Defense counsel did not object to this testimony. *Id.*

The defendant was unable to secure the presence of witnesses Christen Cerbes or David Woslager to testify in his case. RP III. Defense counsel had not subpoenaed either of these witnesses. RP III 438. The defense then rested. RP III 440.

After the State's closing argument, the defendant informed the court that he wanted to do his own closing argument. RP III 473. The defendant then withdrew that request. RP III 475.

The jury convicted the defendant on Counts I, II and III unlawful delivery of a controlled substance. The jury acquitted the defendant on Counts IV and V, intimidating a witness and convicted the defendant on Count VI, intimidating a witness. The jury acquitted the defendant on Count VII, felony harassment. RP III 513-514; CP 168.

On January 8, 2010, the court sentenced the defendant to 48 months.. CP. 213-226.

The defendant timely filed this appeal. CP 234-348.

2. Facts:

Lakewood Police Officer Sean Conlon worked in the special operations unit, handling vice, gang, and narcotic cases. RP I 55-56. In his work, he used CI's who had been previously arrested to trade their sentence "to get a bigger fish." RP I 57. Specifically Conlon allowed CI's to work off their charges to get somebody higher up. RP I 57. CI's are used because they know the street language, are up-to-date on current prices, and already have a source for drugs. RP I 57. The CI is used to help police target specific individuals. RP I 57.

CI's often turn over friends and family members to police. RP II 200.

Conlon was the handler for Kenny Dussault. RP I 59. Dussault previously had worked for the Tacoma Police Department. RP I 61. Dussault had successfully several reliability buys. RP I 61-63. Dussault, like most CI's, used drugs even when working for police. RP I 63. Police customarily enter into a written contract with the CI. RP I 65.

On August 23, 2007, Conlon wanted to use CI Dussault to help go after "a high level methamphetamine dealer" named Dickjose. RP I 66. Because the CI previously had a falling out with Dickjose, the CI needed to go through a third party. *Id.* The defendant was that third party. RP I 68. The CI successfully completed a controlled buy from the defendant who purchased the meth from Dickjose. RP I 69- 71. Conlon did a field

test on the substance to verify that it was meth and then booked it into evidence. RP I 73.

Officer Hamilton assisted Conlon with these controlled buys. RP II 200. His job was to watch the residence of the “middleman.” RP II 203. The CI was supposed to go to this residence and then the middleman would meet the target of the investigation, in this case Dickjose. RP II 203. The middleman was identified as the defendant. RP II 213. Officer Jordan also assisted in surveillance in the buys. RP II 258.

The CI also successfully completed a controlled buy with the defendant on October 25, 2007. RP I 75. Once again, the defendant obtained the meth from Dickjose. RP I 76-81.

On December 5, 2007, the CI once again successfully completed a controlled buy from the defendant who purchased the drugs from Dickjose. RP 82-87.

Police later served a search warrant on the Dickjose home and recovered 8-10 ounces of meth and several “high dollar vehicles.” RP I 87.

Dickjose became a police informant and helped police recover a pound of meth from his supplier. RP I 90.

Conlon explained that the police used arrested persons to help get “bigger fish.” RP 91.

Police arrested the defendant on January 20, 2008. RP 92. Police asked the defendant why he thought they were arresting him. RP I 94. The defendant replied that it was “for threatening your CI.” RP I 94. En route to the jail, the defendant told Conlon that he “wasn’t a big time dealer, just trying to hook up with the CI. Also said that he got the methamphetamine from Dickjose and gave it to the CI.” RP I 97. Police offered the defendant “the opportunity” to work as a CI and he refused. RP 97.

Prior to the defendant’s arrest, the CI and his girlfriend Christin Cerbes asserted that the defendant had been threatening them. RP I 92, 114. The threats were made in December 2007 and early January 2008. RP I 149-153, 168, 187.

The defendant never told Cerbes that he was going to kill the CI. RP I 87. On January 10, 2008, Cerbes told the defendant where the CI was in the casino. RP I 190.

Dussault worked as an informant for Lakewood Officer Conlon. RP I 126-28. He became an informant after Conlon raided his house and found meth. P I 128. Dussault then entered into a contract with Conlon. RP I 129. Dussault ultimately violated the terms of that contract but then entered into another contract to testify against the defendant. RP I 129, 130 Such contracts are written by police and then approved by the prosecutor’s office. RP II 252.

During his first contact with Conlon, the CI wanted to help police arrest Dickjose who was a big target. RP I 132. The CI believed that he could use the defendant to get drugs from Dickjose. *Id.*

The CI made the controlled buys from the defendant. RP I 134-147.

Frank Boshears from the Washington State Patrol Crime Laboratory examined the apparent controlled substances from the buys (Exhibits 1- 4) and determined the substances to be methamphetamine. RP II 284, 287, 289.

The defendant had known Dussault since he was 12 years old. RP III 332. The defendant bought marijuana from Dussault's mother. RP III 332. When the defendant was 19 years old, Dussault introduced him to cocaine. RP III 333.

On August 23, 2007, Dussault told the defendant that he needed to sell a ring so he could hire a lawyer and wanted the defendant to ask Dickjose to look at the ring. RP III 334-335. When the defendant showed the ring to Dickjose, Dickjose said that he did not want it because the diamond was a fake. RP III 336.

When Dussault returned to the defendant's house later that day to pick up the ring, they smoked some of his meth. RP III 337.

On October 25, 2008, Dussault contacted the defendant to ask if they could do some meth together at the defendant's house. RP III 344. The defendant's girlfriend Diane drove Dussault to the defendant's house while the defendant packed his work tools at his site. RP III 344. When the defendant arrived home, Dussault left in a hurry. RP III 345.

Before Dussault left, the men discussed cast iron metal cars. RP III 346. The defendant mentioned that Dickjose also collected cars and that he had "probably about a thousand of them." RP III 346.

Shortly thereafter Dussault returned to the defendant's house with some of the cars. RP III 346. The defendant thought that Dickjose might want to buy the cars and so he called Dickjose to ask if he wanted to buy them RP III 350. After Dussault and Diane left in the car, Dickjose arrived at the defendant's house and took the cars. RP III 346-350.

Dickjose did not want to buy the cars until he determined that he was not getting ripped off. RP III 350. The defendant and Dickjose went to HobbyTown. RP III 351. Dickjose then decided to buy the card and went to the bank to get the money to buy the cards. RP III 351-52. Dickjose delivered the money to the defendant's house. RP III 352. Dussault dropped by, smoked some meth, and then left with the money. RP III 352.

The defendant denied ever threatening Cerbes or Dussault. RP III 355 – 360.

Diane Jones, the defendant's girlfriend at time of the charged incidents, and Donald Schindler, his employer at the time, testified so as to corroborate the defendant's testimony. RP III 398 -417; 428-433.

D. LAW AND ARGUMENT:

1. THIS COURT SHOULD REVERSE THE DEFENDANT'S CONVICTIONS WHERE TRIAL COUNSEL FAILED TO PROVIDE CONSTITUTIONALLY EFFECTIVE ASSISTANCE TO THE DEFENDANT.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. *Strickland*, 466 U.S. at 690-91. The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.

State v. Leavitt, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). If either element of the test is not satisfied, the inquiry ends. Hendrickson, 129 Wn.2d at 78.

There is a strong presumption that counsel's performance was reasonable. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient. Hendrickson, 129 Wn.2d at 77-78; McFarland, 127 Wn.2d at 336.

a. Defense counsel failed to object to repeated testimony by the State's witnesses that the defendant was "the middleman" in a drug operation where such evidence was irrelevant and unfairly prejudicial to the defendant..

ER 401 defines "relevant evidence" as

"evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probable than it would be without the evidence."

ER 403 provides that relevant evidence may be excluded if it is unfairly prejudicial.

In the instant case, trial counsel failed to object to highly prejudicial evidence. This is no legitimate strategic or tactical advantage to permit the admission of such evidence. Trial counsel failed to grasp the significance of this issue and made no motion to exclude this evidence.

It is well-settled that the State and its witnesses may not testify that the defendant is guilty. Whether testimony constitutes an impermissible opinion as to the defendant's guilt generally depends on the specific circumstances of each case. *City of Seattle v. Heatley*, 70 Wn. App. 573, 577-578, 854 P.2d 658 (1993). Further, it is well-settled that drug transactions charges such as in the instant case may be proven via a “buy – bust” cases where an informant simply purchases controlled substances from a target. *State v. Casto*, 39 Wn.App. 229, 692 P.2d 890 (1984). This type of “buy – bust” transaction was all that was necessary to prove that the defendant had committed the crimes of delivery of a controlled substance. Further, the State in the threats charges could have and should been limited to evidence of the conduct between the defendant and Dussault and Cerbes. Proof of these charges did not did not require evidence of some over-arching drug operation.

There is no doubt but that for the testimony of Officer Conlon that he used CI Dussault to help go after “a high level methamphetamine dealer” named Dickjose. RP I 66. Because the CI previously had a falling out with Dickjose, the CI needed to go through a third party. *Id.* The defendant was that third party. RP I 68. The CI successfully completed a controlled buy from the defendant who purchased the meth from Dickjose.

RP I 69- 71. Conlon did a field test on the substance to verify that it was meth and then booked it into evidence. RP I 73.

The police testimony undoubtedly resulted in the defendant's convictions. This is so because the jury must have concluded that the police relied on the defendant's actions to get "a bigger fish." Because the defendant was the individual who could get the "bigger fish", the jury naturally likely concluded that the defendant was a middleman in the chain of a drug operation.

The issue thus was whether the defendant was involved in a drug operation that placed him squarely in the middle between the "little fish" and the "big fish." The jury thus heard evidence that exceeded the evidence necessary to prove the State's allegations that the defendant delivered a controlled substance to another. In this case, the State's evidence focused only on the defendant and not on any other alleged accomplices. The State easily could have proved its case without the evidence of an over arching drug operation.

Because trial counsel failed to move to exclude evidence that portrayed the defendant was part of drug operation the defendant was convicted on inadmissible evidence. Further, trial counsel apparently failed to perceive this important issue, he failed for no legitimate strategic

or tactical reason to move to exclude the most damning evidence against the defendant. The jury thus convicted the defendant.

b. Defense counsel was constitutionally ineffective when he failed to subpoena witnesses essential to the defense.

At the conclusion of the defense case, trial counsel informed the court that two witnesses had failed to appear. RP IV 436. Defense counsel readily acknowledged that he had not subpoenaed the witnesses and that he otherwise had not secured their appearance. RP IV 438-439.

Defense counsel represented that one of the witnesses, Mr. Woslager (with whom defense counsel had not spoken to for ten months) would have testified that he dialed the call when the defendant allegedly threatened Cerbes and that no threats were made. His testimony was important because it corroborated the defense theory of the case that no threats had been made. Likewise, Cerbes would have explained how police twisted her words when in fact she never said that the defendant threatened her. RP IV 436-437.

Because trial counsel failed to subpoena these essential witnesses, he was constitutionally deficient in his representation. It should go without saying that an attorney who intends to present witnesses at trial should subpoena them to ensure their appearance. There is no legitimate or tactical reason to do otherwise.

2. THIS COURT SHOULD REVERSE THE DEFENDANT'S
CONVICTIONS WHERE THE PROSECUTOR REPEATEDLY
ENGAGED IN MISCONDUCT

(a) The prosecutor repeatedly elicited testimony that the defendant was a “middleman” in a multi-level drug operation and that the use of a confidential informant was necessary to catch “bigger fish”.

The State has an ethical duty to present only evidence necessary to prove its case. The State should not offer evidence that is superfluous to the case at hand nor should it offer evidence that is unfairly prejudicial. This evidence is unfairly prejudicial because it constitutes an opinion on the defendant's guilt.

For the reasons noted in the previous section, the State repeatedly engaged in misconduct when it offered unfairly prejudicial and superfluous evidence in order to convict the defendant. Usually, a “middleman” brings the buyer to the supplier, much like a real estate agent creates a relationship between homebuyer and seller. The “middleman” receives a percentage of the narcotics from the buyer as compensation for arranging the transaction. There was no evidence that Mr. Gross belonged to any drug organization. This evidence was without basis and unfairly prejudicial to Mr. Gross. *City of Seattle vs. Heatley*, 70 Wn. App., 573, 578-79, 854 P.2d 658 (1993).

3. THE DEFENDANT IS ENTITLED TO RELIEF BECAUSE THE STATE FAILED TO FILE FINDINGS OF FACT AND CONCLUSIONS OF LAW AFTER THE CrR 3.5 HEARING.

Whether to reverse or dismiss a conviction when a trial court fails to enter timely, written findings of fact and conclusions of law is a legal issue the court decides for the first time on appeal. *See State v. Portomene*, 79 Wn. App. 863, 864-65, 905 P.2d 1234 (1995); *State v. Nelson*, 74 Wn.App. 380, 393, 874 P.2d 170 (1994). See e.g., *State v. Brockob*, 159 Wn.2d 311, 343-44, 159 P.2d 59 (2006). Various rules require the trial court to enter findings and conclusions in order “to have a record made,” which enables us “to conduct Thus, on appeal the court considers whether there is a sufficient record for review. *Nelson*, 74 Wn.App. at 393. Although the appellate may reverse if the trial court does not enter findings and conclusions at all, “failure to enter written findings and conclusions is a clerical error that may be corrected . . . after an appeal is filed.” *State v. Priutt*, 145 3Wn.App. 784, 794, 187 P.3d 326 (2008).

Untimely findings and conclusions may require reversal where the delay prejudices the defendant or the State tailors the findings to meet the issues raised in the appellant's brief. *See State v. Lopez*, 105 Wn.App. 688, 693, 20 P.3d 978 (1992).

CrR 3.5 requires entry of findings of fact and conclusions of law.

In this case, the State failed to enter findings of fact and conclusions of law and therefore this matter must be remanded to the superior court for entry of findings of fact and conclusions of law. The defendant may well have raised other issues on appeal based on the findings of fact and conclusions of law. Thus the State's inaction is more than a mere formality.

E. CONCLUSION:

For the reasons set forth herein, the defendant respectfully asks this court to reverse the defendant's convictions.

RESPECTFULLY SUBMITTED this 6th day of December, 2010.


BARBARA COREY, WSBA#11778
Attorney for Appellant

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STATE OF WASHINGTON
DEPUTY
COURT OF APPEALS
DIVISION II

CERTIFICATE OF SERVICE:

I declare under penalty of perjury under the laws Of the State of Washington that the following is a true and correct: That on this date, I delivered via ABC- Legal Messenger/U.S. Mail-postage pre-paid, a copy of this Document to: Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Ave So, Room 946 Tacoma, Washington 98402 and to Kenneth Gross DOC#16550 177th Ave SE, P.O. Box 777 Monroe, WA 98272

12/10
Date


Legal Assistant