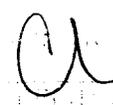


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No. 41045-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

MICHAEL L. MELLOR JR.,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK McCAULEY, JUDGE

BRIEF OF RESPONDENT

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A. STATE'S RESPONSE TO ASSIGNMENT OF ERRORS

- 1. Mr. Mellor's attorney did provide effective assistance of counsel.**
 - a. Mr. Mellor did receive effective assistance of counsel as guaranteed by the federal and state constitutions.**
 - b. Defense counsel cross-examination of Sergeant Kolilis that elicited a hearsay statement by non-testifying witness was part of defense counsel overall strategy.**
 - c. Defense counsel's failure to object to Sergeant Kolilis' testimony concerning fresh shoe and fingerprints was a case of counsel picking his battles, not ineffective assistance of counsel.**
 - d. Defense counsel not ineffective for failing to object to hearsay statement concerning law enforcement's initial cause to respond to the property in question.**
 - e. Defense counsel elicited testimony from the trooper as to Mr. Mellor's statements while in custody was part of a valid trial strategy.**
- 2. Failure of Mr. Mellor's receiving a 3.5 hearing does not invalidate the fact that the defendant still knowingly, intelligently and voluntarily waived his constitutional right to remain silent.**

B. STATEMENT OF THE CASE

The State agrees and accepts the respondent's statement of the case in this matter.

C. ARGUMENT

Mr. Mellor was caught red-handed by Trooper Aston inside the locked fence of Rollins Auto Wrecking. When the trooper pulled up, Mr. Mellor was exiting a small building in the front of the property with his arms full of items. (RP 33, 34). The items in his hands consisted of numerous miscellaneous things taken from inside the business; coveralls, hand tools, paint can, etc. (RP 34, 42-44, 82-84, 86, 93).

After Trooper Aston exited his vehicle he instructed Mr. Mellor to come to the fence and to his location, to which Mr. Mellor complied. Mr. Mellor set down the items in his hands and upon an initial question by the trooper asking what he was doing there, confessed that he was inside the business without permission. (RP 37). In the trooper's opinion, Mr. Mellor was showing the effects of methamphetamine use at the time of his contact. He was sweating, talking fast, breathing fast and exhibiting jerky movements. (RP 37, 38). Mr. Mellor was handcuffed and put into the back of the state patrol vehicle. (RP 39).

Mr. Mellor was read his constitutional rights by Trooper Aston and stated that he understood them. Despite the warnings, Mr. Mellor voluntarily continued to talk to Trooper Aston during the time of the

transport back to the jail. (RP 41). Mr. Mellor is searched incident to arrest at which time the trooper discovers a film canister with methamphetamine in Mr. Mellor's pants pocket, along with a glass smoking pipe. (RP 45). The methamphetamine was positively identified by the Washington State Patrol Crime Laboratory as being methamphetamine. (RP 99).

The State's case against Mr. Mellor was very strong. He was caught by law enforcement coming out of the building inside the fenced off area of the auto wrecking yard with hands full of items taken from inside the business. He admitted that he had no permission to be there. The manager of the auto wrecking yard also stated that he had no permission to be there. Once searched incident to arrest, methamphetamine and drug paraphernalia was found on his person. This fact pattern did not leave defense counsel much to work with. Just the same, defense counsel did have strategy for a defense in this matter. Throughout the cross-examination of the State's witnesses, the defense attempted to show that Mr. Mellor believed that he would find a person living on the property that he could get parts from and that the police did not do a complete and thorough investigation to assure themselves that there was not someone else on the property besides Mr. Mellor.

"To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice." To show the first prong, ineffective representation, Mr. Mellor

must show that Mr. Tadique's performance in his defense of Mr. Mellor "fell below an objective standard of reasonableness." To meet the second prong, showing prejudice, Mr. Mellor must show that but for Mr. Tadique's performance the results would have been different. *State v. McNeal*, 145 Wash.2d 352, 362, 37 P.3d 280 (2002). "No particular set of detailed rules for counsel's conduct can satisfactorily take account to the verity of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052 (1984). The courts give a strong presumption a trial attorney's performance is adequate. They also give strong deference to the defense counsel's decisions on strategy and trial tactics. If trial counsel's performance can be shown to be as part of a legitimate trial strategy or as part of trial tactics, then such conduct can answer as a rebuttal for claims of ineffective assistance of counsel. *McNeal*, 145 Wash.2d at 362.

The Supreme Court in *Strickland* stated that in order for review courts to make a fair assessment of a defense counsel's performance the "distorting affects of hind sight" had to be eliminated and there was a need to evaluate the conduct from a counsel's perspective at the time." *Strickland*, 466 U.S. at 669. The *Strickland* court further went on to say that a court need not even consider the first prong of the test, whether the counsel's performance was deficient, if it can more easily dispose of the ineffectiveness claim by showing that there is lack of sufficient prejudice

to the defendant's case from defense counsel's conduct. *Id.*, 466 U.S. at 670. To put it another way, a verdict overwhelmingly supported by the record is much less likely to be affected by any defense counsel errors, then one only weakly supported by the record. *Id.*, at 696.

ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

- 1. Mr. Mellor's attorney did provide effective assistance of counsel.**
 - a. Defense counsel had a logical and tactical reason for asking the question of Sergeant Kolilis that ended up eliciting hearsay testimony.**

Defense counsel was in the midst of trying to prove a reasonable doubt as to Mr. Mellor's intent with regard to being on the property at that time. In particular, he was trying to show that Mr. Mellor had previously been on that property to meet with an individual allegedly staying on that property in order to do business with him. This is shown by a number of the questions leading up to the question which elicited the hearsay statement from Sergeant Kolilis:

Question: Do you know whether or not people have ever - employees have ever resided in this location?

Question: Okay, is it likely or do you think it's possible that if somebody was there on the premises working or doing anything that he could have been around the back area?

(RP 24).

Question: It's entirely likely - -
Answer: It is possible.
Question: - - that someone could have
been back there working?
Answer: Yes.
Question: And that somebody like my
client trying to find
somebody there working so
he - he could buy something
would walk around that way
and see an open door?
Answer: Yes.
Question: Okay. Now, did you ever
make any attempt to find out
who owned these items?
Answer: No.

(RP 25).

Defense counsel's questions to Sergeant Kolilis were obviously intended to follow-up his previous questions intending to show that the sergeant did not do enough follow-up investigation about who actually owned the property in Mr. Mellor's possession and whether Mr. Mellor had permission to be on that property. The sergeant responded by saying Mr. Lukin had told him that Mr. Mellor had gone in without permission and taken some property was in response to defense counsel's question about further investigation. This was undoubtedly not what defense counsel was anticipating as an answer but it was still a valid question for defense counsel to ask. He was trying to impeach the officer for doing an

incomplete investigation, one that might have shown that Mr. Mellor had permission to be on that property or at least would have a valid reason for assuming he had permission to be on that property. Defense counsel's follow-up questions for Sergeant Kolilis after the hearsay statement was as follows:

Question: Okay. So you have just hearsay statements, but you never got any positive identification as to who owned this?

Answer: I –

Question: Did anybody - -

Answer: I felt at the time that was pretty positive. But did I have something that could say they were the owner? No, I did not.

Question: Right. Okay. No further questions.

Appellant counsel relies on *State v. Hendrickson* to show that defense counsel's elicitation of hearsay testimony would violate the defendant's confrontation rights sufficiently to constitute ineffective assistance of counsel. In *Hendrickson*, the defendant was accused of a number of counts of possession of stolen property and identity theft. At jury trial, the jury convicted the defendant of a number of the original counts, including one count for possession of an individual's social security card. The one piece of evidence showing that the defendant did not have permission to have the social security card was an investigator's

conversation with the true owner of the social security card. That owner did not testify at trial. Instead, the investigator gave a hearsay statement on the witness stand of what he spoke about to the owner of the social security card. The appeals court held that this hearsay was impermissible due to the fact that it was the main piece of evidence against the defendant on that particular count. *State v. Hendrickson*, 138 Wash.App. 827, 158 P.3d 1257 (2007).

There, the appeals court found that the statement was testimonial in nature in that the investigating officer was a government agent who was conducting a criminal investigation when questioned the owner of the social security card, so the hearsay was testimonial. That court held that the defendant's attorney's failure to object to this testimony was crucial because that was the only evidence the State had linking the social security card to the area where the defendant lived and the only evidence that the defendant did not have a valid reason to possess the card. The court could see no tactical reason for defense counsel's failure to object and held that there was a reasonable probability that had this evidence been suppressed that the defendant would have been found not guilty of the charge. *Henderson*, 138 Wash.App. at 833 (2007).

Mr. Mellor's case is distinguishable from *Hendrickson* on two important points. First, there was plenty of other evidence to convict Mr. Mellor of the crime of burglary. The state trooper personally observed Mr. Mellor coming out of a building inside the property, then slipping

through the locked chain link fence to come to his position. Mr. Mellor had the items held in his hands taken from inside the property. This evidence alone would have been more than sufficient to convict Mr. Mellor of a charge of Burglary in the Second Degree. The hearsay comments of Mr. Lukin, while not helpful to this defense case, conceivably did not do much harm.

The second point is that Mr. Tadique, Unlike the defense attorney's failure to object in *Hendrickson*, had a tactical reason to ask the question that he did of Sergeant Kolilis. Mr. Tadique did not object to the sergeant's testimony about Mr. Lukin's hearsay statements because (a) Sergeant Kolilis was answering the question that defense counsel asked; and (b) objecting to the answer to the question would have called more jury attention to the hearsay statement, possibly worsening and compounding the damage even further. Asking for and possibly getting a court instruction to the jury to disregard Sergeant Kolilis' last statements would undoubtedly do nothing more than draw more attention to it. Further, defense counsel did attempt to discredit the Lukin hearsay during his closing.

The case of *Mason v. Skully*, 16 F.3d 38, (United States Court Appeals 2nd Cir. 1994) is also distinguishable on the same grounds. There, four men had robbed a jewelry store in 1986. Three of the men pled guilty to Second Degree Robbery and one of them, Mr. Mason, elected to stand trial. Mr. Mason was not initially identified by any of the eye witnesses to

the robbery. After a police detective had arrested the other three individuals, Mr. Mason's name came up. The meat of the prosecution's case consisted of the detective testifying about what he was told about Mr. Mason by one or more of the co-defendants. In that case, the court found that there was no police work that led to Mr. Mason except for the conversation the detective had with the out-of-court co-defendants, which was hearsay. The court held that trial counsel's failure to object to this testimony or the prosecutor's implication and summation in closing was performance that fell below the constitutional standard. The court could see no tactical advantage to the failure to object to this testimony. *Mason*, 138 Wash.App. at 44.

The appeal at hand is much more similar to a Fifth Circuit decision discussed in the *Mason* case, *Foy v. Donnelly*, 959 F.2d 1307 (5th Cir. 1992). In that case, the court rejected a confrontation clause claim from the defendant based upon the prosecutor's questions focusing on a confession which had not been disclosed to defense previously. There, the court held that the undisclosed confession was not discussed in any detail in the jury's presence and that it did not clearly implicate Foy or directly eluded to him. It also held that "[T]here was so much other evidence connecting Foy to the crime that was no necessary inference that [the co-defendants] statement had implicated Foy." *Donnelly*, 959 F.2d at 1313 (5th Cir. 1992). Again, the *Foy* case is like the present case in that regard;

there is still more than enough evidence to convict Mr. Mellor without the use of the hearsay statement.

The defense use of the case of *People v. Phillips*, 27 Ill.App.3d 581, 592 N.E.2d 233, 234 (1992) and the case of *People v. Moor*, 36 Ill.App.3d 117, 824 N.E.2d 1162 (2005) have essentially the same problems. They are cases where either the defense counsel had absolutely no conceivable reason for the tactical blunders he made and essentially made a case for the State or involved the overturning of a lower court decision when the hearsay evidence was all there really was to convict the defendant.

Here, it is obvious that the defense counsel's intention during the cross-examination of Sergeant Kolilis was not to bring out Mr. Lukin's hearsay statement. Instead, defense counsel was in the midst of questioning the sergeant about why he did not find out whether Mr. Mellor actually had permission to be there or not. The defense question was clearly part of his large term strategy for this particular case and therefore, his performance was not deficient toward Mr. Mellor's defense.

b. Sergeant Kolilis did not testify as a expert witness in describing the crime scene, including fingerprints and shoe prints.

Sergeant Kolilis testified that, based on his years of experience, he could recognize fresh fingerprints and had experience noting the size and apparent freshness of footprints in certain situations. (RP 13, 18).

Sergeant Kolilis did not testify as to actual fingerprint patterns nor take a cast of the footprint for comparison to the defendant's shoes. He did not testify as an expert, only as an observant and experienced investigator, seeing what any lay person would see if they looked and made common sense deductions from what they saw.

In a Washington State Court of Appeals case from Division III in 2002, the court stated that a police detective could, with sufficient training and experience, qualify to talk expertly on certain subject matters, notwithstanding that person's lack of formal education in the field under discussion. *State v. McPherson*, 111 Wash.App. 747, 46 P.3d 284 (2002), was a case where an individual was arrested for methamphetamine production. The State offered the investigative detective's testimony about meth labs in general and the meth lab question in particular. Defense objected because the State had not met the ER 702 requirement qualifying the detective as an expert. The appeals court disagreed, stating; "[p]ractical experience is sufficient to qualify a witness as an expert." *McPherson*, 111 Wash.App. at 762 (2002). Meth production was not particularly difficult and that it could be done relatively easily by laymen without a higher education. It also found that the detective had participated in a number meth lab busts and had gone through extra training on courses offered by DEA in regard to meth labs. The court summed up with holding that the detectives background and

experience merely went to weight of his evidence and not its admissibility. *Id.*, at 762.

Here, Sergeant Kolilis has testified that he has had years of police experience including fingerprints analysis. He was not testifying about actual individual fingerprint identification, nor was he talking about an actual cast of a footprint. He was testifying about what a layman could see if that person would observe closely a dirty window with fresh fingerprints on it or undisturbed soil with fresh footprints on it; Sergeant Kolilis just had the training to know were to look and to look more closely.

It is obvious that defense counsel saw no point in objecting to testimony about fresh shoe or finger prints being found by Sergeant Kolilis, as there was already evidence introduced through other testimony that Mr. Mellor had, indeed, been on the property. There was no point in denying that fact and that was the tactical decision on the defense counsel's part. By looking at the report of proceedings, one can easily see that defense counsel was trying to show, and did show, that the sergeant did not know who made those footprints and that it could have been made by a previous trespasser or by Mr. Lukin.

Question: Could you be certain then that it was Mr. Lukin?

Answer: What's that?

Question: Were you certain that it wasn't Mr. Lukin?

Answer: No, I cannot be certain it wasn't Mr. Lukin.

Question: Let's clarify this then.
You're not certain that it was
my client who did this then,
right?

Answer: I'm certain that it happened
that day which what you're
asking me.

(RP 18).

Question: Okay. Did you take a sample
of the shoe size that made
those marks?

Answer: No, I did not.

Question: Did you bother to look up
what size shoe my client has?

Answer: No, I did not.

Question: You could have done that,
couldn't you?

Answer: It's possible that I could have
done that.

Question: Would that be a more
complete and thorough
investigation if you had done
that?

(RP 19).

Question: Okay. And just based on
your common sense
observations of being - dust
moving around you're certain
that this had to have
happened this day.

Answer: Yes.

Question: Okay. But you're not certain
who did it?

Answer: What's that?

Question: You're not certain who did it right?

Answer: Correct.

Question: Because it's entirely possible it was Mr. Lukin?

Answer: Entirely possible.

(RP 20).

You could see by the question and answer of the cross-examination of Sergeant Kolilis that defense counsel was casting doubt on who actually made the fingerprints and footprint marks as opposed to trying to claim that Mr. Mellor had not been on the property at all. The defense counsel made a tactical decision that, instead of butting his head up against testimony based on direct observation of an officer, he would try to discredit the testimony or raise sufficient doubt to discredit the evidence of fingerprints and footprints and cast doubt on who actually made them.

c. Defense counsel failure to object to testimony about the originating 911 call was not deficient.

Testimony was introduced through State witnesses about the original call to the 911 center that caused a response of Trooper Aston and Sergeant Kolilis. Specifically, it was reported that a white pickup was parked at the business and the caller thought this was suspicious as the business was closed. The evidence that came out was that they were responding to a call of a white pickup parked in front of the business.

Such testimony was not harmful to defense because defense was not disputing the fact that Mr. Mellor was there. There is no tactical or logical reason to dispute Mr. Mellor's presence at the site, seeing how, once again, he was caught red-handed there by Trooper Aston. Further, the entire content of the 911 call was not submitted as evidence, simply the fact that there was a report of a white pickup truck being there. This was admitted not to prove the truth of the matter asserted, but rather to explain why police were responding to the property in the first place. "[W]hen a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible. *State v. Iverson*, 219 Wn.App. 329, 337, 108 P.3d 799 (2005), *See also State v. Lillard*, 122 Wn.App. 422, 437, 93 P.3d 969 (2004) (the State did not offer [the informants] statements to prove what the cardholders had said, but to show how [the detective] conducted his investigation). Further, even if it was error under *Crawford* to allow such testimony in, the overwhelmingly untainted evidence would still necessarily lead to a finding of guilt and any error on defense counsel's part for failure to object to this particular bit of evidence was harmless.

d. Defense counsel was not in error for eliciting further testimony from the trooper about Mr. Mellor's in custody statements.

Defense counsel's actions on eliciting further statements from Trooper Aston on Mr. Mellor's statements made during the conversation

in the car back to the police station was essentially damage control. On direct examination by the State, the trooper had stated that Mr. Mellor was on release from the jail at the time he committed the offense at issue. (RP 67, 68). Mr. Tadique objected to that line of questioning and that answer in particular. The court sustained the objection and instructed the jury to disregard the last question and answer. (RP 68). Although the objection was sustained and the jury instructed to ignore that information, that bell had already been rung. The only thing Mr. Tadique could do was try to lessen the damage of that information having already come out. Defense counsel was trying to show that Mr. Mellor was being extremely talkative and agreeing to whatever Trooper Aston suggested to him.

Question: Four hour conversation in a half an hour that you had?

Answer: Right.

Question: And it's also true that you said to him, don't you know you're not supposed to be burglarizing places. And he responded, yeah, probably not?

Answer: Yeah. Because it had to go in context the reason why he would talk about it a minute ago - -

Answer: So those were - -

Answer: He was out, so we're trying to say if you're out, you're not supposed to breaking the law and using methamphetamine.

Question: So those were your words?

Answer: Those are - yeah. Yeah.
Those are my words
summing up everything he
said because he said so much.

Question: But you're asking - - you're -
you're basically lecturing
him, correct? You're telling
him that he what he should
and shouldn't be doing
because he nods yes or no or
agrees with you now say that
that's his statement?

Answer: I guess.

(RP 70, 71).

Defense counsel's action in bringing the subject matter up again was a tactical decision to do damage control on what had already come out in testimony even though it had been previously objected to and sustained. The defense counsel's objecting to the information on direct shows that he was doing his job as an effective counsel. The fact that he had to try to repair some of the damage done only goes to show that he was cognizant of what needed to be done in this trial and was giving effective assistance of counsel.

2. Failure of Mr. Mellor's receiving a 3.5 hearing does not invalidate the fact that the defendant still knowingly, intelligently and voluntarily waived his constitutional right to remain silent.

The State admits that no 3.5 hearing was held in this matter due to an error on the State's part. A 3.5 hearing was originally set. (Supp. CP

request for a trial hearing date, sub. No. 12, 10-14-09) That hearing was canceled on the State's understanding that a change of plea was occurring. When that change of plea did not come about, the 3.5 hearing was not rescheduled for trial due to the State's oversight.

However, there is no evidence presented at trial that had Mr. Mellor receive a 3.5 hearing that his statements would not be admissible at trial. Mr. Mellor was advised twice of his *Miranda* rights, once by Trooper Aston and then again by Sergeant Kolilis. Trooper Aston stated that Mr. Mellor responded that he understood his rights. (RP 41). Mr. Mellor spoke willingly to Trooper Aston on first contact before he was placed under arrest. Specifically, Mr. Mellor admitted at first contact, when asked if he had permission to be inside the business, stated that he did not. (RP 37, line 11, 12). Mr. Mellor's other statements were made while he was being handcuffed and while he was being transported back to the police station. Statements made to Trooper Aston in the back of the car were made after he had been twice read his *Miranda* warnings and acknowledged them, at least the first time. (RP 38, 69, 70).

Courts have allowed defendant statements without having previously had a 3.5 hearing when the courts have been able to determine that the defendant knowingly and voluntarily understood his rights and waived those rights. The United State Supreme Court has held that an explicit statement of waiver of constitutional rights as found in a 3.5 hearing, is not absolutely necessary to support a finding the defendant

waived those rights. *State of North Carolina v. Butler*, 441 U.S. 369, 99 S.Ct. 1755 (1979). In *Butler*, the Supreme Court held that silence on the part of the defendant after being read his *Miranda* rights was generally not enough to show the fact that he understood those rights and waived them, but that an express statement can constitute a waiver. “An express written or oral statement of waiver to the right to remain silent or the right to counsel is usually strong proof of the validity of that waiver, but is not inevitable either necessary or is sufficient to establish waiver. The question is not one of form, but rather whether the defendant, in fact, knowingly and voluntarily waived the rights delineated in the *Miranda* case.” *Butler*, 441 U.S. 373 (1979). The other court went on to say that *Miranda* holds that mere silence is not enough but that does not mean the defendant’s silence, when coupled with an understanding of his rights and a course of conduct indicating waiver, may never support a conclusion that a defendant has knowingly waived his rights. *Id.* (See also, *State v. Woods*, 34 Wash.App. 750, 665 P.2d 895 (1983) - [stating that a waiver may be inferred from particular facts and circumstances and where substantial evidence shows that a trial court could have found that a confession was voluntary, that trial courts determination would not be overturned.] *State v. Falk*, 17 Wash.App. 905, 908, 567 P.2d 235 (1977) - [“[T]he mere failure to hold a CrR 3.5 hearing does not render an otherwise admissible statement inadmissible.”] *State v. Kidd*, 36 Wash.App. 503, 509, 674 P.2d 674 (1984) - [“Failure to hold a CrR 3.5

hearing, however, does not render a statement inadmissible when a review of the record discloses that there is no issue concerning voluntariness.”]

The fact that Mr. Mellor appeared to be in the grip of the methamphetamine he had just taken earlier in the day is not enough in itself to show his incompetency or inability to knowingly waive his rights. Trooper Aston testified that Mr. Mellor was gushing, sweating, breathing hard, and talking extremely fast, that he did not appear to have control over his muscles and that he was extremely amped up. However, there is no evidence that shows that Mr. Mellor was delusional or was not in control of his mental faculties. He showed mostly physical attributes to the drug and he only spoke faster, possibly from the effect of the drugs. Mr. Mellor still made sense, was coherent and offered no indication that he was in the midst of anything like a drug psychosis.

The State of Washington has held that the taking of drugs itself does not render statements inadmissible or a confession involuntary. In the case of *State v. Sergeant*, 27 Wash.App. 947, 621 P.2d 209 (1980), the court was discussing a confession made by an individual who was at Western State Hospital on anti-psychotic medication. Evidence showed that the defendant was on the wrong medicine and was having bad side effects from the medication he was on. In that case, the defendant called the police unprompted and made a confession to them concerning the killing of his mother. The court, while finding that in this particular case the confession was involuntary, spoke more about confessions and drug

use. “The taking of drugs by the defendant does not by itself render the confession involuntary.” *Sergeant*, 27 Wash.App. at 951 (1980).

In the Washington State Supreme Court case of *State v. Aten*, the court followed the U. S. Supreme Court reasoning about confessions under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966). There, the court again held that to be voluntary for due process purposes the voluntariness of a confession is determined from the totality of the circumstances under which it was made. Factors considered include the defendant’s physical condition, age, mental abilities, physical experience, and police conduct. A defendant’s mental disability and use of drugs at the time of confession are also considered but those factors did not necessarily render a confession involuntary. *Aten*, 130 Wash.2d at 663-664 (1996).

The court here must look at the totality of the circumstances concerning Mr. Mellor’s out-of-court statements and confessions. This includes not only his use of drugs, but also the police conduct, his age and mental abilities and physical condition. Mr. Mellor’s physical condition is quoted as being a “burly guy.” (RP 38). There is nothing in the record to indicate that Mr. Mellor had a mental condition, or that the police were engaged in misconduct in any during the contact investigation or transport of Mr. Mellor. Mr. Mellor was an adult, not a juvenile. The only thing that shows Mr. Mellor had anything out of the ordinary going on with him at the time was that he was apparently “tweaking” on methamphetamine. (RP 38). As mentioned before, most of the manifestations as evidenced of

Mr. Mellor's influence of methamphetamine were physical. The only non-physical appearance of his drug use was the fact that he was talking very fast. There is no evidence that what he was saying was not making any sense or that he was delusional.

Lastly, any error that may have occurred allowing Mr. Mellor's non-custodial statements to be heard by the jury would be harmless. The evidence before the jury showed that Trooper Aston came up on the scene and observed Mr. Mellor leaving a building inside the compound with items in his hands. The evidence further shows that Mr. Mellor admitted not having permission to be in the compound. Testimony from the property manager stated that he did not have permission. With all this evidence before the jury, even if Mr. Mellor's statements had been suppressed, the jury would still have more than enough evidence to find Mr. Mellor guilty of the charges of Burglary in the Second Degree and Possession of Methamphetamine.

CONCLUSION

The defense counsel did not render ineffective assistance in this matter. Defense counsel was faced with hard first-hand and eyewitness evidence that Mr. Mellor had committed the crimes as charge. Mr. Tadique engaged in the only defense strategy likely to succeed in this type of situation, which was to try to cast doubt upon various elements of the crimes as charged: specifically permission to enter, proof that the

fingerprints and footprints were his, and the alleged lack of thorough enough investigation on the part of the police. To try to show that none of it happened would have been a strategic error and to not address the damaging evidence would also have been strategically disastrous for Mr. Mellor's trial. Mr. Tadique did the best that any defense lawyer could with the fact pattern situation he was handed.

The lack of a CrR 3.5 hearing for Mr. Mellor and accompanying Findings of Fact and Conclusions of Law showing that he knowingly and voluntarily waived his rights to remain silent is not fatal to the State's case. Evidence was shown that Mr. Mellor knowingly and voluntarily waived his right to remain silent after being advised of that right and stating he understood them. Under the facts of this particular case, the finding of guilt for Mr. Mellor in this matter was almost inevitable despite any statements he may or may not have made being admitted during his jury trial.

The State respectfully requests that this court reject the appellant's arguments and find that the conviction stands.

DATED this 13 day of April, 2011.

Respectfully Submitted,

By: 
GORDON L. WRIGHT
Deputy Prosecuting Attorney
WSBA #32997

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BY: [Signature]

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

STATE OF WASHINGTON,
Respondent,
v.
MICHAEL L. MELLOR JR.,
Appellant.

No.: 41045-1-II
DECLARATION OF MAILING

DECLARATION

I, Barbara Chapman hereby declare as follows:

On the 18th day of April, 2011, I mailed a copy of the **Brief of Respondent** to:

Elaine L. Winters
Washington Appellate Project
1511 - 3rd Avenue, Suite 701
Seattle, WA 98101-3635

Michael L. Mellor Jr. 747449
Coyote Ridge Corrections Center
P. O. Box 769
Connell, WA 99326-9723

by depositing the same in the United States Mail, postage prepaid.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 18th day of April, 2011, at Montesano, Washington.

Barbara Chapman