

No. 42315-4-II
Cowlitz Co. Cause No. 10-1-00476-6

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

STATE OF WASHINGTON,

Respondent,

v.

JESUS VILLARREAL,

Appellant.

BRIEF OF RESPONDENT

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I. ANSWERS TO ASSIGNMENT OF ERROR

1. The trial court appropriately denied the motion to suppress the evidence because there was a reasonable articulable suspicion to support the limited *Terry* detention of the appellant.
2. The trial court did not commit structural error based on the admission of hearsay evidence, because that evidence was entered by agreement of the parties.
3. There was no *Crawford* violation, because (1) the appellant was given the opportunity to cross examine the witness at trial and *Crawford* does not apply to suppression hearings, and (2) the hearsay evidence was admitted by agreement of the parties.
4. There was sufficient evidence to support the charge of possession with the intent to deliver beyond a reasonable doubt, because a reasonable trier of fact could conclude that based on the amount of narcotics, the amount of cash present, the presence of a police scanner, and the appellant's own statements that he intended to deliver the narcotics in his possession.
5. The trial court properly admitted the expert testimony of Detective Tim Watson of the Cowlitz Wahkiakum Narcotics Task Force, when it found the detective's testimony would address issues beyond the realm of common understanding and assist the trier of fact.
6. The school zone enhancement was constitutionally applied in this case.
7. The prosecutor did not commit misconduct.

II. STATEMENT OF THE CASE

The Respondent generally accepts the Appellant's recitation of the facts, with a few additions and a brief overview. On May 25th, 2010, Detectives and law enforcement agents from the Cowlitz

Wahkiakum Narcotics Task Force, the Longview Police Street Crimes Unit, the Drug Enforcement Administration, and the Federal Bureau of Investigation were involved in a controlled buy and search warrant execution on Victoria Ortega-Barrera, her home, and the home of her brother. RP 3. On that date, detectives conducted a controlled buy operation on Victoria Ortega-Barrera and bought 88.2 grams of methamphetamine through a confidential informant at her house at 99 Home Court, Kelso, Washington. RP 3-4. After leaving the 99 Home Court house, she was taken into custody and surveillance was set up on her home at 99 Home Court, Kelso, Washington, as well as 90 Kiltie Place, Kelso, Washington, the home of her brother. The surveillance units were supposed to contain the homes while Detective Kevin Tate from the Cowlitz Wahkiakum Narcotics Task Force applied for a search warrant for the 99 Home Court and 902 Kiltie Place residences. RP 5.

After Victoria Ortega-Barrera was taken into custody, surveillance units observed the defendant in this case, Jesus Miguel Villarreal, leaving the 99 Home Court residence. RP 6. Detectives observed Villarreal leave the house and enter a Ford Pickup truck at the scene and remove a bag from a vehicle parked in the driveway. *Id.* Detective Sgt. Kevin Tate was informed and he directed Detective Kevin Sawyer to stop Jesus Villarreal. *Id.* Detective Kevin Sawyer was a Longview Street Crimes detective and certified narcotics K-9

handler and was standing by to assist with the ongoing investigation. RP 13. He had a personally issued patrol car and was already active in other unrelated aspects of the investigation when he was contacted by Detective Tate. RP 13.

Detective Sawyer found Villarreal at the intersection of North 1st and Barnes. RP 14. Villarreal had been kept under surveillance the entire time. RP 23. Detective Sawyer saw Villarreal look at him and then set a black computer style bag that he had been carrying behind a large garbage can. RP 16. Sawyer then activated his emergency lights and contacted Villarreal, who had begun to walk away from the area without the bag. RP 17. Sawyer asked Villarreal what was going on and he replied "nothing." RP 18. Sawyer asked Villarreal what he had set down and he replied that he didn't know what Sawyer was talking about. RP 18. Sawyer asked Villarreal whether the bag belonged to him or if it was stolen, Villarreal said that he had set the bag down and it belonged to him. RP 18.

Sawyer asked if he could check the bag and told Villarreal that he did not have to let him look in the bag. RP 17-18. Villarreal told Sawyer he could look in the bag. RP 18. Sawyer located a total of 34.3 grams of methamphetamine, separately packaged, and a bag of marijuana (3.9 grams). RP 18.

The appellant moved to suppress the evidence obtained from the search based on a lack of articulable suspicion under *Terry v. Ohio*, but this motion was denied. The trial court considered the facts and determined that there was a reasonable articulable suspicion. RP 58. The court the found that, considering the credibility of the various witnesses and the lack of consistency between the testimony of the appellant's witness and the appellant's own testimony, the appellant consented to the search of the bag. RP 59.

At trial, Detective Sawyer testified to basically the same facts, and specifically that the appellant had approximately 33 grams, or over one ounce, on his person at the time of his contact, as well as over \$1,700 and a police scanner. Detective Sawyer testified that the Street Crimes Unit, which targets "low-level" dealers, typically purchases drugs in 0.2 gram increments, up to a "teener" which is approximately 1.77 grams. RP 91. He testified that if found someone he could purchase 33 grams of methamphetamine from he would give the case to the Task Force as that amount was well outside their lower range. RP 99. Detective Watson testified that, in in his experience as a long-term veteran of the Cowlitz Wahkiakum Narcotics Task Force, when drugs are purchased at the ounce level they are often received in large packages, and not necessarily pre-divided into small sale amounts. RP 172. He also testified that individuals that purchase drugs at that level do not usually carry scales, because they are

generally capable of eye-balling amounts. RP 173. He further testified that in his experience drug users rarely bulk purchase for a variety of reasons. RP 173.

The appellant testified that he purchased the drugs in two separate transactions for a total of \$550. RP 194. He also testified that he went to the house because he had left his ounce of methamphetamine there earlier in the day. RP 193.

III. ARGUMENT

A. THE STOP AND DETENTION OF THE APPELLANT WAS LAWFUL UNDER *TERRY* v. *OHIO*

The stop and detention was valid under *Terry v. Ohio* and the trial court should be affirmed. In Washington “if a seizure is a *Terry* stop, it need not be supported by probable cause to believe that a crime has been committed, but it must be supported by ‘specific and articulable facts which taken together with rational inferences from those facts, reasonably warrant that intrusion.’” *State v. Lund*, 70 Wn. App. 437, 445, 853 P.2d 1379 (1993), citing *Terry v. Ohio*, 392 U.S. 1, 21 (1968) (other citations omitted). The level of suspicion necessary to support an investigative detention is “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Probable cause is not required for a *Terry* stop because a stop is significantly less intrusive than an arrest. *Id.* The court should consider the totality of the circumstances presented to the investigating officer when determining whether a

Terry stop was lawful. *State v. Doughty*, 170 Wn.2d 57, 62, 239 P.3d 573 (2010).

In this case there was a reasonable articulable suspicion that a crime had occurred and the appellant was stopped lawfully. The appellant was seen approaching then leaving an actual (not suspected) drug house in the middle of night while it was under surveillance by narcotics officers. The appellant was seen getting into a vehicle in the driveway, removing a bag, then leaving the premises. Before the appellant was detained, he made eye contact with Detective Sawyer and dropped the bag that he had taken from the vehicle parked in front of the drug house. All of these circumstances reveal a reasonable articulable suspicion that the appellant was involved in illegal activity.

This case presents significantly different facts than *Doughty*, the principle case upon which the appellant relies. In *Doughty*, the court was faced with a stop based on an incomplete observation by a general patrol officer that the individual had stopped at a suspected drug house at 3:20am. *Id.* at 60, 239 P.3d 573. The reason the house was “suspected” to be a drug house was based solely on neighbor complaints, not actual evidence of drugs, controlled buys, or even reports of known drug users frequenting the house. *Id.* Nor did the officer see any of the suspect’s actual activity at the house, whether anyone answered the door, or even whether the suspect had simply

gone to the wrong house. *Id.* at 64, 239 P.3d 573. The court found that the two-minute stay at the “suspected” drug house at 3:20am was not sufficient for *Terry*.

In contrast, there is no question that the house the appellant contacted was a drug house, police had conducted a large controlled buy from the residence earlier that day. This takes this case past the “theoretical” drug house at issue in *Doughty* and into the realm of the actual. This is crucial, as Justice Chambers in a concurring opinion in *Doughty* noted that the outcome of the case might have been different with different circumstances. *Id.* at 65, 239 P.3d 573. Justice Chambers found that there was no *Terry* justification for the stop because the house was only “suspected” to be a drug house, and that suspicion was based on tips from neighbors about short stay traffic. *Id.* The house at issue in this case was an actual drug house and that significantly shifts the analysis.

More importantly, the activity of the appellant in this case was linked to this house in a way the *Doughty* case lacked. Where the *Doughty* court had a patrol officer who did not actually see what happened when the suspect approached the “suspected” drug house, this case presented the trial court with the appellant engaging in specific conduct that tied him to that house (or at least one of the vehicles in front of the house). The appellant actually entered and removed a bag from a vehicle parked in the driveway of the house,

which again, takes him beyond the “theoretical” connection that existed in *Doughty* and into the realm of actual nexus. Unlike *Doughty*, where it could have been a case of someone simply walking up to the wrong house, the appellant’s actions show that he was either involved with the house by his removal of the bag, or was stealing from it.

It was certainly reasonable for detectives to think any number of possible illegal activities had or were about to occur, including the possibility that Villarreal was taking drugs from the scene to avoid their discovery in a subsequent search warrant, that Villarreal was taking drugs from the scene as part of a separate drug transaction, or that Villarreal had stolen a laptop computer out of the truck.

Detectives were confronted with an individual leaving a house at night, taking out a laptop-style bag, and leaving without getting into any vehicle, shortly after the owner of the house, who had sold over 88 grams of methamphetamine to detectives earlier in the day, was taken into custody and before detectives could serve a search warrant at the residence. Taking the totality of the circumstances into account, detectives were justified in stopping the appellant.

This case further departs from the theoretical realm of *Doughty* when the court considers the appellant’s actual behavior before the stop. The appellant made eye contact with Detective Sawyer before he was actually stopped and upon observing him, put his shoulder bag

down behind a dumpster and walked away from the bag. Sawyer saw this and then activated his overhead lights. This action further raises suspicion, given the totality of the circumstances. The appellant was walking away from a known drug house in the middle of the night after taking something from a truck parked in the driveway of the drug house. When he saw a police officer, he put that “something” he took from the truck behind a dumpster and walked away from it, indicating the contents were likely evidence of a crime.

There was a reasonable articulable suspicion that criminal activity had occurred. Unlike *Doughty*, where the drug involvement was entirely theoretical, this case presents the court with a very specific nexus both to the house and narcotics and the appellant to the house. This case is distinguishable from *Doughty*. In fact, this case presents the court with the key facts that were missing in *Doughty*. Considering the totality of the circumstances, the *Terry* stop of the appellant was lawful and the trial court’s decision should be affirmed.

B. PRETEXT ANALYSIS IS NOT APPLICABLE IN THIS CASE

The appellant makes a variety of pretext arguments, but none of them should be compelling to this court. It can be stated no better than the court’s succinct description of a pretext stop in *Ladson*, where the court noted that:

the essence of this, and every, pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.

138 Wn.2d 343, 349, 979 P.2d 833 (1999). The appellant's attempt to put pretext at issue in this case stretches the legal doctrine well beyond its borders. Detective Sawyer had no idea who he was stopping at the time of the contact. RP 13. He made the stop based on the observations of other officers, as well as his own. He testified that the appellant's actions made him think either the bag had drugs in it, or that the bag was stolen. RP 17. There is simply no evidence that he used a pretext to contact the appellant.

Nor was a pretext offered as justification for the search of the bag. The appellant was stopped and investigated based on his actions. Part of that investigation hinged on the bag, which he was seen taking from a vehicle parked in the driveway of a drug house. An examination of the bag was well within the scope of the *Terry* investigation and no pretext was necessary. He simply did not need a pretext. The appellant gave consent to search the bag.

Pretext is simply not an issue in this case.

C. THE TRIAL COURT DID NOT COMMIT ERROR WHEN IT ALLOWED HEARSAY EVIDENCE TO BE PRESENTED AT THE SUPPRESSION HEARING

The trial court properly admitted hearsay evidence by the agreement of the parties. Specifically, the record shows that Washington State Department of Corrections Officer Pratt was unavailable for the suppression hearing and that rather than move the

suppression hearing, defense counsel opted to simply go forward based on Detective Tate's representation of what Officer Pratt described. RP 10. The judge acknowledged that in addition to the ER 1101 analysis, he also made his decision to allow the testimony based on the agreement of the parties. RP 10. The hearsay evidence was not admitted over objection and any alleged structural error is rendered moot by the agreement of the parties. Indeed, there was no objection to the testimony when given and the only reason the trial court was even aware of the issue was because the State tried to clarify why particular witnesses were called. RP 10.

Nor does it seem likely the outcome would have been different had Officer Pratt testified and an alternate version of events emerged as suggested by the appellant. This was a factual issue that the trial court itself did not resolve. Specifically, the trial court when addressing the rationale behind its decision noted that, "The Defendant is seen leaving the house or driveway, it's not clear which..." RP 58. Even taking the appellant's allegations as true, the only real difference between Detective Tate's recitation of Pratt's testimony and Officer Pratt's own recitation is whether or not the appellant was seen leaving the residence itself or from the driveway. Both versions agree that the appellant accessed the vehicle before leaving. In any event, the trial court did not rely on this distinction when making the ruling, finding only that it was unclear which of the

two situations had occurred, but focusing instead other unrelated issues. There is no indication that the opportunity to cross-examine would have changed the outcome of the trial.

The appellant does not cite any authority that suggests that a suppression hearing requires the full panoply of rights ordinarily accorded a defendant at trial. In fact, the courts have long held the opposite, that hearsay is admissible in pretrial proceedings, including suppression hearings. *State v. Fortun-Cebada*, 158 Wn.App. 158, 172, 241 P.3d 800 (2010), *citing McCray v. Illinois*, 386 U.S. 300, 311-13 (1967) (further citations omitted). The witness at issue was simply unavailable and rather than resetting the suppression motion defense counsel elected to have Detective Tate simply testify to the officer's observations. This was done by the agreement of the parties and does not constitute error.

D. THERE WAS NO CRAWFORD VIOLATION

Crawford was not implicated because no hearsay statements were used against the defendant at trial and the Confrontation Clause does not apply to suppression hearings. Specifically, the court in *Fortun-Cebada* found that there was "no right to confrontation at a pretrial CrR3.6 evidentiary hearing on a motion to suppress under the Sixth Amendment and *Crawford*." 158 Wn.App. at 173, 241 P.3d 800. The appellant's suggestion that the holding in *Fortun-Cebada* only applies where the confrontation clause violation "did not occur at the

proceeding at which it was relevant” is at best disingenuous. *Fortun-Cebada* is dispositive of this issue. There was no *Crawford* violation.

E. THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE GUILTY VERDICT

There was sufficient evidence to support the jury’s verdict of guilty. The test for sufficiency of the evidence is whether any rational trier of fact could have found guilt beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). All reasonable inferences are drawn in favor of the verdict and interpreted most strongly against the defendant. *State v. George*, 146 Wn.App. 906, 919, 193 P.2d 693 (2008); *citing State v. Gentry*, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995). As this court noted in *State v. Summers*, “in determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt but only that substantial evidence supports the State’s case.” 107 Wn.App. 373, 28 P.3d 780 (2002). The question becomes, drawing all rational inferences in favor of the State and against the defendant, whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt and whether such a finding would be supported by substantial evidence. The answer is yes.

To support the inference that the appellant possessed with the intent to deliver where the inference is based on a large quantity, some additional factor must be present. *State v. Hutchins*, 72 Wn.App.

211, 216, 868 P.2d 196 (1994). The State presented evidence that the defendant had over an ounce of methamphetamine on him, a police scanner, as well as \$1,700. No pipe was found by the police. He was seen taking the bag the drugs were found in from a vehicle parked in the driveway of a house in the middle of the night. The methamphetamine found the bag was divided into a few separate containers. Testimony established that the amount was significantly more than an average user would have, and specifically, more than the average dealer targeted by the low level Street Crimes Unit. Testimony also established that the buying bulk was very rare in the user-community.

Testimony also established the likelihood, given the circumstances, that the appellant had simply just re-upped, which would be why the methamphetamine was not packaged in commonly saleable quantities. Testimony also illustrated that common costs for methamphetamine at various quantities and how discounts are usually received, either from quantity or long-standing relationship. The appellant's testimony indicated that he had purchased the methamphetamine from two different sources for a total of \$550, including from a source he had just recently met. This would be approximately ½ of the generally accepted wholesale purchase price. He also testified that he had walked by the house multiple times that day without picking up his methamphetamine and essentially waited

until 2:30am to go pick it up. Evidence of his convictions for trafficking in stolen property and theft were also introduced.

This case presents very similarly to *State v. Campos*, 100 Wn.App. 218, 998 P.2d 893 (2000). In that case the appellant had approximately an ounce of cocaine, \$1,750 on his person, and no scales or other drug paraphernalia. *Id.* at 224, 998 P.2d 893. An officer testified that an ounce was more than was commonly held for personal use. The appellant also had a pager, a cell phone, and a piece of paper consistent with a drug ledger. *Id.* The court ultimately found that even though the appellant had presented innocent explanations for each of those things, the jury resolved those issues in favor of the state and that there was sufficient evidence to support the verdict. *Id.* This case presents nearly identical facts to the case at the bar.

The court acknowledged that an ounce is generally considered a large amount. *Id.* at 223, 998 P.2d 893, *citing State v. Lopez*, 79 Wn.App. 755, 904 P.2d 1179 (1995), *citing State v. Lane*, 56 Wn.App. 286, 297, 786 P.2d 277 (1989). The amount of money was about the same as in this case and the court considered this “an additional factor showing intent.” *Id.* The court also cited *People v. Robinson* and noted that possession of police scanners, beepers, or cellular telephones are factors that support an inference of intent to deliver. *Id.*, *citing People v. Robinson*, 167 Ill.2d 397, 408, 212 Ill. Dec. 675, 657 N.E.2d 1020(1995). The only real difference between the two cases seems to

be that *Campos* also had a ledger. In any event, the State simply had to show some additional factor to support the inference of intent to deliver and that was done through the introduction of the police scanner, large amount of cash, or the lack of any use paraphernalia. There was sufficient evidence to support the conviction.

The appellant's suggestion that it was error to admit the police scanner should not be well-taken by this court, in fact the case cited to support that proposition, *State v. Zimmer*, acknowledged that police scanners could be used to indicate an intent to deliver. 146 Wn.App. 405, 413, 190 P.3d 121 (2008), *citing Campos*, 100 Wn.App. at 224, 998 P.2d 893 (further citations omitted). Innocent explanations carry no weight when considering the sufficiency of the evidence to support a verdict, because the evidence is construed in the light most favorable to support the verdict. That means the jury could have concluded that the existence of the scanner supported the inference of intent to distribute.

In the same line of analysis, the testimony of the appellant had issues, including a lack of internal consistency. The appellant testified that he had received better ½ wholesale pricing from two different sources, which is itself inconsistent with the notion of a bulk purchase, and inconsistent with the reasoning offered behind wholesale pricing, specifically the highest quantities getting the highest discount. The appellant's further testimony that he had

purchased some of the methamphetamine at this incredible discount from someone he had just met is also inconsistent with the bulk sale theory. His statement that he used approximately an eighth of an ounce a day could be considered inconsistent with his story that he left his entire stash, with a high monetary value, at someone else's house the whole day, only to return at 2:30am. His record of previous convictions also could have colored the jury's perception of his credibility.

Considering all of the facts, there was sufficient evidence to support the verdict. Ignoring innocent explanations, the evidence showed that the appellant had over an ounce of methamphetamine, a large amount of cash, and a police scanner on him at 2:30am and that he had picked up the bag that had all of that stuff in it from the driveway of someone else's house. The evidence showed that such an amount was large and consistent with him having the intent to distribute, that the packaging was consistent with someone just picking up a large amount for later resale, and that there was no evidence of any paraphernalia that would have enabled the appellant to actually use the drugs. There need only be some additional factor present to support the inference of intent to deliver. In this case, there were several, including the large amount of cash and the presence of the scanner. The facts are very similar to *Campos*, where the inference was found to be upheld. The court should not disturb

the jury's verdict because it was based in evidence sufficient to support a finding of guilt.

F. DETECTIVE WATSON'S TESTIMONY WAS RELEVANT AND LAWFUL

Detective Watson of the Cowlitz Wahkiakum Narcotics Task Force was appropriately allowed to testify to relevant information regarding drugs, drug trafficking, and drug dealing. Trial courts have broad discretion in determining whether such expert testimony is admitted and the trial court's ruling should not be disturbed absent an abuse of discretion. *Phillippides v. Bernard*, 151 Wn.2d 376, 393, 88 P.3d 939 (2004). To support admission of expert testimony, the court need only find that the witness qualifies as an expert and that the testimony would be helpful to the trier of fact. *State v. Lewis*, 141 Wn.App. 367, 166 P.3d 786, *review denied* 163 Wn.2d 1030, 185 P.3d 1195 (2007). Courts construe helpfulness to the trier of fact broadly. *Phillippides*, 151 Wn.2d at 393, 88 P.3d 939. The appellant concedes that qualifications of Detective Watson. App. Brief 24. The trial court, after hearing a sketch of the anticipated testimony, found that it would be relevant and assist the jury in understanding a world that is beyond common understanding. RP 147.. The testimony of Detective Watson was relevant, admissible, and did not amount to improper opinion of the guild of the appellant. The court should not disturb the trial court's determination on appeal.

The world of drug dealing is arcane and expert testimony is commonly permissible to help the trier of fact understand that world. *State v. Avendano-Lopez*, 79 Wn.App. 706, 711, 904 P.2d 324 (1995). See also *State v. Cruz*, 77 Wn.App. 811, 813–14, 894 P.2d 573 (1995), *State v. Sanders*, 66 Wn.App. 380, 832 P.2d 1326 (1992), and *State v. Strandy*, 49 Wn.App. 537, 543–44, 745 P.2d 43 (1987), review denied, 109 Wash.2d 1027 (1988).

In *Cruz*, the court upheld the expert testimony of a King County Drug Enforcement Unit detective that had no personal involvement in the case and who was unfamiliar with the defendant. 77 Wn.App. 813-14, 894 P.2d 573. The detective testified about a “typical” heroin transaction in a delivery trial and was asked questions including the following:

(1) What does heroin look like? (2) How much is typically involved in a transaction? (3) How and with what implements is heroin ingested? (4) Is heroin a social drug? (5) Do police officers in a heroin investigation usually work undercover alone? (6) Why are informants used in heroin investigations? (7) What is a controlled buy? (8) Where do heroin transactions commonly take place? (9) Why do they usually take place in public areas? (10) Why is it common for a heroin supplier to hide the drugs outside? (11) How does a typical heroin transaction proceed after the parties agree to meet? (12) Did the detective gain his knowledge of heroin transactions from personal experience?

Id. The court quoted *Seattle v. Heatley*, noting that “[t]estimony that is not a direct comment on the defendant’s guilt or on the veracity of a witness, is otherwise helpful to the jury, and is based on inferences

from the evidence is not improper opinion testimony." *Id.* at 814, 894 P.2d 573, quoting *Seattle v. Heatley*, 70 Wn.App. 573, 578, 854 P.2d 658 (1993), review denied, 123 Wn.2d 1011, 896 P.2d 1085 (1994). The court found that the detective's testimony did not amount to improper opinion evidence where it did not directly implicate the defendant and was based solely on the detectives experience in other cases. *Id.*

The court in *Sanders* held similarly when it allowed an officer to give expert testimony about the absence of paraphernalia in a house supporting the inference of intent to deliver. The court found that the officer did not give an opinion regarding the guilt of the defendant because the officer testified solely from the physical evidence and his experience and made no opinion as to the defendant's guilt or credibility. 66 Wn.App. at 389, 832 P.2d 1326 (1992).

Finally, in *Avendano-Lopez*, the court considered the expert testimony of an officer regarding the general pattern of drug transactions. Specifically, the officer testified that drug dealers:

usually receive money from the users; often have a lot of money and/or narcotics on their person; carry both very small and large quantities of drugs; often keep drugs in their mouths; are often users themselves; and that heroin is often wrapped in small balloons that resemble party balloons. He also explained how middlemen are used to complete drug transactions.

Id. at 709-10, 904 P.3d 324. The court found that this testimony was admissible expert opinion. *Id.*

Numerous courts have found that the world of drug dealing is strange and beyond the ken of the common juror. In this case in particular, the testimony of Detective Watson was important to show background, practices, and behaviors associated with drug dealing, as well as to explain the presence or absence of a variety of objects beyond the common realm of understanding such as ledgers, the concept of “fronting,” drug packaging, distribution amounts, drug costs, and trafficking. Detective Watson’s testimony helped inform the trier of fact regarding the world of narcotics and it was properly admitted as ER 702 expert testimony. The court’s decision that such testimony was relevant should not be disturbed and certainly did not rise to the level of an abuse of discretion.

Even if the court were to find that the testimony of Detective Watson was not relevant, there can be no prejudice from the admission of his testimony. Like in *Avendano-Lopez*, the appellant used the expert to his own advantage, cross-examining him about the various parts of a typical drug deal that were not present in this case, including the lack of a scale, a ringing cell phone, or pay/owe sheets, as well as the cost-savings from purchasing large quantities of drugs and the fact that methamphetamine is highly addictive and a lifestyle drug. RP 169-70. As in *Avendano-Lopez*, where the defense uses the

officer's own expertise to their advantage they cannot then claim error on appeal. *Id.* at 712, 904 P.2d 324. *See also State v. Francisco*, 148 Wn.App. 168, 178, 199 P.3d 478 (2009).

G. THE SCHOOL ZONE ENHANCEMENT WAS NOT UNCONSTITUTIONAL AS APPLIED TO THE APPELLANT

The school zone enhancement was not unconstitutional as applied to the appellant. As the Court in *Coria* made clear, the actual presence of children is irrelevant to the question of whether or not a school bus stop enhancement is appropriate. *State v. Coria*, 120 Wn.2d 156, 172, 839 P.2d 890 (1992). The purpose of the statute is two-fold, and the first purpose is to keep children, including children living in the areas of bus stops, away from drugs. *Id.* School bus stops are used for this purpose simply because by necessity those bus stops exist where children live. *Id.* The purpose of the statute is to keep children away from bus stops at all times, even when no children are present, to avoid allowing them to gain a foothold in those areas. *Id.* at 173, 839 P.2d 890 (1992).

The appellant was not subject to arbitrary enforcement. He was not lured into the area by law enforcement officers. He was stopped there, but he was present in the area around the bus stop of his own volition. Even if he had been lured into the prohibited area, the enhancement would still apply. *State v. Vinson*, 74 Wn.App. 32, 37, 871 P.2d 1120 (1994). The appellant's reliance on *Coates* is misplaced. The court considered the *Coates* decision in *Coria* and still

found that statute to be constitutional, even when no children were present. The Washington State Supreme Court also definitively answered the question in *State v. McGee*, where it held that it was irrelevant whether the petitioner had intended to deliver in the school zone, or in another location, the only question was whether the individual was physically within 1,000 feet of a school zone when he possessed drugs with the intent to deliver them. 122 Wn.2d 783, 790, 864 P.2d 912 (1993). The court found and specifically interpreted the statute to apply to individuals like the appellant and that the purpose behind such application was to discourage possession of more than personal use amounts within a school zone. *Id.*

The school bus stop enhancement was not unconstitutionally applied to the appellant and the enhancement should not be vacated.

**H. THE PROSECUTOR DID NOT MISLEAD THE JURY
REGARDING THE PRESUMPTION OF INNOCENCE AND
COMMITTED NO MISCONDUCT**

The prosecutor did not commit misconduct or mislead the jury regarding the presumption of innocence. No objection was made at trial, so in order to prevail for prosecutorial misconduct, the court must find the conduct so flagrant and ill-intentioned and the prejudice resulting from it so marked, that a curative instruction could not have neutralized the prejudice. *State v. Charlton*, 90 Wn.2d 657, 585 P.2d 142 (1978).

The prosecutor's comments about quacking ducks did not erode the presumption of innocence. The arguments, as referenced, simply called for the jury to draw inferences from the evidence provided. The prosecutor is allowed to argue, and the jury is allowed to make, inferences based on the evidence. In a case involving possession with the intent to distribute, the only way the State could prove, absent a confession, that the appellant intended to do anything would be through inferences drawn from evidence in the case.

Contrary to the appellant's assertion, the prosecutor's line of argument would not lead to the conclusion that the O.S.U. mascot was an actual duck. App. Brief 31. The court should take judicial notice that the mascot for Oregon State University, which seems to be what the appellant is referring to with "O.S.U.", is actually a beaver. Beavers do not walk, talk, or act like ducks and certainly do not quack.

Nor would the prosecutor's argument lead to the conclusion that the University of Oregon mascot, which is a Duck, was a duck in fact. The Oregon Duck does "quack," but does not quack like a duck, nor does it look like a duck in fact, rather it looks and acts like a caricature of a duck. The distinction is important. By encouraging the jury to look at the actual facts and draw inferences based on those facts, the prosecutor was only encouraging the jury to do what the law required. This line of argumentation had nothing to do with the presumption of innocence. Indeed, based on observation of the facts,

no rational trier of fact could find the O.S.U. mascot was a duck, because the evidence does not support that inference. In this case, however, the evidence certainly supported the inference that the appellant possessed with the intent to deliver.

The prosecutor never suggested that the appellant failed to prove his innocence. Even the most generous interpretation of the words used by the prosecutor falls far short of such an allegation. The appellant first alleges such a statement occurred on RP 209, but a review of that page indicates the prosecutor suggested that the appellant's story was inconsistent with his own statements and that is all. The transcript certainly does not show the prosecutor saying that the appellant failed to show he did not intent to sell 30 grams for huge profit. App. Brief 31. Nor does the prosecutor make such statements on RP 210 or RP 230. Nothing from the transcript suggests that prosecutor told the jury that quantity alone was proof of intent to sell. The prosecutor's statements on RP 224 are related to questioning the appellant's credibility but do not come close to the statement "that an innocent person would have remembered more details about the day of his arrest," as suggested by the appellant.

The final allegation, that the prosecutor indicated the appellant's testimony was inconsistent with Detective Watson's testimony, is relatively accurate, but only in the sense the transcript reveals an analysis of the appellant's story and the lack of consistency

with the admitted evidence at trial. RP 225, 227. None of statements actually made by the prosecutor rise to the level of misconduct, erode the presumption of innocence, or create any prejudice to the appellant, save for illustrating his actual guilt.

Even if the court were to find some level of misconduct, there was certainly nothing approaching misconduct so terrible it could not be cured with an instruction from the court. The prosecutor committed no misconduct and the jury's verdict should be affirmed.

IV. CONCLUSION

The appellant raises a number of issues, but none should compel this court to vacate the conviction. The motion to suppress was appropriately denied because there evidence of a reasonable articulable suspicion to support the limited *Terry* detention of the appellant. No pretext was used to justify the stop. No error was committed when hearsay evidence was admitted at that hearing by agreement of the parties. Nor was there a *Crawford* violation, since *Crawford* does not apply to suppression hearings. The denial of the defense motion to suppress was appropriate and should not be disturbed on appeal.

Considering the trial issues, there was sufficient evidence to support the jury's verdict. Evidence of additional factors, aside from the large amount of narcotics, included the large amount of money, time, location, presence of a scanner, the lack of personal use

paraphernalia, and the appellant's own statements regarding his version of the events. Expert testimony was offered by Detective Tim Watson with the Cowlitz Wahkiakum Narcotics Task Force that shed further light on the weights, amounts, common usage, and rhythm of the drug trade. This evidence was relevant, did not address an ultimate issue, and its admission was well within the sound discretion of the trial court. Considerable deference should be given to the jury's verdict and every possible inference should be drawn from the evidence to support it. Given the facts of this case, there was sufficient evidence to support the jury's verdict and that verdict should not be disturbed on appeal.

The school zone enhancement was constitutional applied to the appellant in this case. The Supreme Court in *McGee* definitively answered this issue and noted that the statute was meant to apply in this specific situation and that it was rationally related to the governmental purpose of safeguarding children. The court should not find the statute unconstitutional as applied.

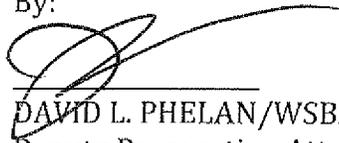
Finally, the prosecutor committed no misconduct. Even if the court were to find the prosecutor committed misconduct, none of the alleged statements would rise to the level of acts so flagrant and ill-intentioned that a curative instruction would not have cured the prejudice.

This court should affirm the verdict of the jury and the decisions of the lower court on the various issues raised by the appellant.

Respectfully submitted this 29th day of February, 2012 .

SUSAN L. BAUR
Prosecuting Attorney

By:

A handwritten signature in black ink, appearing to read "DAVID L. PHELAN", written over a horizontal line.

DAVID L. PHELAN/WSBA # 36637
Deputy Prosecuting Attorney
Representing Respondent

APPENDIX

RULE ER 702
TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

**ER RULE 1101
APPLICABILITY OF RULES**

(a) Courts Generally. Except as otherwise provided in section (c), these rules apply to all actions and proceedings in the courts of the state of Washington. The terms "judge" and "court" in these rules refer to any judge of any court to which these rules apply or any other officer who is authorized by law to hold any hearing to which these rules apply.

(b) Law With Respect to Privilege. The law with respect to privileges applies at all stages of all actions, cases, and proceedings.

(c) When Rules Need Not Be Applied. The rules (other than with respect to privileges, the rape shield statute and ER 412)) need not be applied in the following situations:

(1) Preliminary Questions of Fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under rule 104(a).

(2) Grand Jury. Proceedings before grand juries and special inquiry judges.

(3) Miscellaneous Proceedings. Proceedings for extradition or rendition; detainer proceedings under RCW 9.100; preliminary determinations in criminal cases; sentencing, or granting or revoking probation; issuance of warrants for arrest, criminal summonses, and search warrants; proceedings with respect to release on bail or otherwise; contempt proceedings in which the court may act summarily; habeas corpus proceedings; small claims court; supplemental proceedings under RCW 6.32; coroners' inquests; preliminary determinations in juvenile court; juvenile court hearings on declining jurisdiction; disposition, review, and permanency planning hearings in juvenile court; dispositional determinations related to treatment for alcoholism, intoxication, or drug addiction under RCW 70.96A; and dispositional determinations under the Civil Commitment Act, RCW 71.05.

(4) Applications for Protection Orders. Protection order proceedings under RCW 7.90, 10.14, 26.50 and 74.34. Provided when a judge proposes to consider information from a criminal or civil database, the judge shall disclose the information to each party present at the hearing; on timely request, provide each party with an opportunity to be heard; and, take appropriate measures to alleviate

litigants' safety concerns. The judge has discretion not to disclose information that he or she does not propose to consider.

(d) Arbitration Hearings. In a mandatory arbitration hearing under RCW 7.06, the admissibility of evidence is governed by MAR 5.3.

COWLITZ COUNTY PROSECUTOR

February 29, 2012 - 12:14 PM

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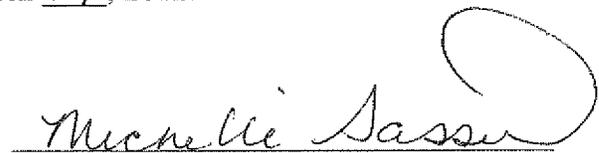
CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on ^{Feb} March 29, 2012.


Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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