

NO. 46107-2-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TORIBIO AMARO-SOTELO,

Appellant.

RESPONDENT'S BRIEF

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I. ISSUE

1. Did Detective Brown improperly comment on the Appellant's right to remain silent?
2. Was the Appellant right to confront an adverse witnesses violated when the trial court admitted the certified court record?
3. Did the trial court abuse its discretion by overruling the Appellant's trial counsel's objection and admitting the certified court record?
4. Did the Appellant received ineffective assistance of counsel?
5. Did the trial court undermine the Appellant's presumption of innocence and infringe on his right to present a defense?

II. SHORT ANSWER

1. **No.** The Appellant had voluntarily waived his right to remain silent.
2. **No.** Exhibit #12 is a certified court record and does not implicate the Appellant's right to confront an adverse witness.
3. **No.** The trial court properly admitted Exhibit #12, a certified court record.
4. **No.** The Appellant did not receive ineffective assistance of counsel.
5. **No.** The trial court properly instructed the jury; thus, the Appellant's presumption of innocence was not undermined.

III. STATEMENT OF FACTS

The State agrees, for the most part, with the factual and procedural history as set forth by the Appellant. Where appropriate, the State's brief will point to the record to address specific facts in contention regarding the issues before the Court.

IV. ARGUMENT

A. DETECTIVE BROWN DID NOT COMMENT ON THE APPELLANT'S RIGHT TO REMAIN SILENT.

“The right to remain silent, or the privilege against self-incrimination, is based upon Amendment V of the United State Constitution which provides in pertinent part that ‘[n]o person...shall be compelled in any criminal case to be a witness against himself...’” *State v. Sweet*, 138 Wn.2d 466, 480, 980 P.2d 1223 (1999). Prior to any custodial interrogation, a suspect must be informed of his *Miranda*¹ warnings. *State v. Piatnitsky*, 180 Wn.2d 407, 412, 325 P.3d 167 (2014). “It is well established that *Miranda* rights must be invoked unambiguously.” *Id.* at 413 (citing *Davis v. United States*, 512 U.S. 452, 459, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994); *State v. Radcliffe*, 164 Wn.2d 900, 906, 194 P.3d 250 (2008)).

Here, the Appellant’s argument that Detective Brown commented on his right to remain silent is without merit. The Appellant asserts that he invoked his right to remain silent. The record, however, clearly refutes this claim. Detective Brown informed the Appellant of his *Miranda* warnings. RP at 76-77; 331. The Appellant understood his rights and agreed to waive them. RP at 77-78; 331-332. The Appellant agreed to speak with Detective

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

Brown about his investigation. RP at 78; 332-334. Detective Brown told the Appellant that he was the focus of a drug investigation and had sold drugs to the Task Force. RP at 332. The Appellant denied selling drugs. RP at 333. Detective Brown repeated to the Appellant that the Task Force did in fact buy drugs from him. RP at 333. The Appellant, in response to this statement from Detective Brown, “smirked or smiled and looked up at the sky and said ‘well, then, you’re going to have to prove it.’” RP at 333-34.

Nowhere in the record does the Appellant ever invoke his right to remain silent. Every statement was taken after *Miranda* warnings had been given and formally waived, and were in direct response to Detective Brown’s questions/statements.

The Appellant would have this Court believe that when he denied selling drugs, in direct response to Detective Brown’s statements, that he was in fact invoking his right to remain silent. The Appellant also wrongfully states that he was faced with only two options when he was confronted by Detective Brown: confess or exercise his rights. *Appellant’s Brief* at 9. There is actually a third option, deny, which is exactly what the Appellant did. The Appellant’s reliance upon *State v. Holmes*, 122 Wn. App. 438, 93 P.3d 212 (2004), is misplaced. The analysis in that case was directed at what the defendant was *not saying* and how he was reacting.

Here, the Appellant was responding to direct statements after he waived his right to remain silent.

In the alternative, even if this Court finds that Detective Brown's testimony was a comment on the Appellant's right to remain silent, the testimony was harmless beyond a reasonable doubt. Simply put, even if there was an error, a reasonable jury would have reached the same verdict with or without the error. *State v. Silva*, 119 Wn. App. 422, 431, 81 P.3d 889 (2003). "The State must point to sufficient untainted evidence in the record as to inevitably lead to a finding of guilt." *Id.*

The Appellant sold drugs to Mr. Enfield on five different occasions. The first controlled occurred on December 7, 2011. RP at 154. Three detectives with the Task Force participated in the controlled buy. RP at 154. The Appellant was seen in direct contact with Mr. Enfield. RP at 161, 224. Mr. Enfield returned from his contact with the Appellant with a bag of drugs. RP at 163. The entire contact between the Appellant and Mr. Enfield was recorded. RP at 158. As Sergeant Tate testified, a portion of the audio recording was consistent with drug transactions. RP 196.

The second controlled buy occurred on January 25, 2012. RP at 198. This controlled buy involved three Detective with the Task Force. RP at 198, 225. The Appellant was seen in direct contact with Mr. Enfield. RP at 203. The Appellant was seen reaching into his pocket, hand something

to Mr. Enfield, and then place his hand back in his pocket. RP at 203. Mr. Enfield returned to the detectives with a bag of drugs. RP at 260. The entire contact between the Appellant and Mr. Enfield was recorded. RP at 264-67.

The third controlled buy occurred on February 16, 2012. Three detectives were involved in this transaction. RP at 204, 271. Mr. Enfield was entered the Appellant's home, exited, and returned to the detectives location with a shotgun. RP at 273. Mr. Enfield gave a shotgun to the detectives and told them that the Appellant had sold it to him. RP at 274. The entire contact between the Appellant and Mr. Enfield was recorded. RP at 272, 282-87. The Appellant is heard discussing the shotgun transaction with Mr. Enfield throughout the audio recording. After that transaction was completed, Mr. Enfield called the Appellant to arrange a drug transaction for February 17, 2012. This conversation was recorded. RP at 289-93. The Appellant is heard agreeing to sell Mr. Enfield "chiva" (heroin) and "window" (methamphetamine). RP at 294.

The fourth controlled buy occurred on February 17, 2014. RP at 294. Three detectives were involved with this transaction. RP at 234, 295. Mr. Enfield is seen entering the Appellant's residence. RP at 239. Mr. Enfield returned to the detectives' location and provided them with a bag of drugs. RP at 298. The contact between Mr. Enfield and the Appellant was

recorded. RP at 296. On the recording, the Appellant is heard discussing drugs. RP 306, 312.

The fifth and final controlled buy occurred on February 25, 2014. Three detectives worked on this controlled buy. RP at 317-318. Mr. Enfield was seen contacting the Appellant and entered his residence. RP at 239. Mr. Enfield then met up with the detectives and provided them with a bag of drugs. RP at 320. This transaction was recorded. RP at 320.

As the above rendition of the record shows, there was clearly proof beyond a reasonable doubt that the Appellant sold Mr. Enfield drugs on five separate occasions. Furthermore, the Appellant admitted that it was his voice on the recordings that were admitted into evidence. RP at 433. Therefore, if there was any error, it was harmless.

B. CERTIFIED COURT DOCUMENTS ARE NOT SUBJECT TO THE CONFRONTATION CLAUSE.

“A confrontation clause violation does not occur unless the admitted hearsay evidence was ‘testimonial’ and the accused did not have a prior opportunity to cross-examine the unavailable declarant.” *State v. Fleming*, 155 Wn. App. 489, 501-02, 228 P.3d 804 (2010) (citing *State v. Kirkpatrick*, 160 Wn.2d 873, 882, 161 P.3d 990 (2007), *overruled by State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012)). “Certified records that are not prepared for use in a criminal proceeding...are not testimonial.” *Jasper*, 174 Wn.2d

at 112. “Nontestimonial statements do not implicate the confrontation clause and are admissible if they fall within a hearsay exception.” *State v. Hubbard*, 169 Wn. App. 182, 187, 279 P.3d 521 (2012) (citing *State v. Saunders*, 132 Wn. App. 592, 601, 132 P.3d 743 (2006), *review denied*, 159 Wn.2d 1017, 157 P.3d 403 (2007)).

“Certified court records are public records and fall within the recognized hearsay exception for such records.” *Hubbard*, 169 Wn. App. at 187; RCW 5.44.010, .040. The Judicial Information Service (“JIS”) “is the primary information system for courts in Washington” and “serves as a statewide clearinghouse for criminal history information.” *In re Adolph*, 170 Wn.2d 556, 570, 243 P.3d 540 (2010) (quoting Washington Courts, JIS, <http://www.courts.wa.gov/jis>). “The validity and reliability of criminal history reports generated from information in the JIS...is secure because only Washington State court personnel have access to the JIS to input case information. As such, the reports generated from the JIS are an *official court record*.” *State v. Cross*, 156 Wn. App. 568, 588, 234 P.3d 288 (2010) (emphasis added).

Here, the Appellant’s argument is without merit. The Appellant mischaracterizes Exhibit 12 as a “printout.” Exhibit 12 is a JIS printout that was certified by the Cowlitz County District Court. As stated above, JIS reports are official court records. Certified court records are public records

and are nontestimonial. As such, the confrontation clause was not implicated when the trial court admitted Exhibit 12 into evidence.

C. EXHIBIT 12 IS A JIS DOCUMENT, WHICH IS ADMISSABLE AS A CERTIFIED COURT RECORD.

As stated above, the Appellant mischaracterizes Exhibit 12 as simply a “printout.” Exhibit 12 is a JIS document, which is an official court record. Exhibit 12 was certified by the Cowlitz County District Court. Therefore, Exhibit 12 is a certified court record. “Certified court records are public records and fall within the recognized hearsay exception for such records.” *Hubbard*, 169 Wn. App. at 187; RCW 5.44.010, .040. “[E]xtrinsic evidence of the authenticity of a certified copy of a public record is not required; such documents are considered self-authenticating.” *Hubbard*, 169 Wn. App. at 187; ER 902(d); *State v. Benefiel*, 131 Wn. App. 651, 655-56, 128 P.3d 1251 (2006).

D. THE APPELLANT DID NOT RECEIVE INEFFECTIVE ASSISTANCE OF COUNSEL.

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wn. App. 256, 262, (1978); *see also* U.S. Const. Amend. VI, Wash. Const. art. 1, § 22. “[T]he substance of this guarantee is that courts must make ‘effective’ appointments of counsel.” *Jury*, 19 Wn. App. at 262 (quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)). Whether counsel

is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* (citing *State v. Myers*, 86 Wn.2d 419 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263.

The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn. App. 166, 173 (1989) (citing *State v. Sardinia*, 42 Wn. App. 533, 539, *review denied*, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* “A defendant must meet both prongs to satisfy the test.” *State v. Brockob*, 159 Wn.2d 311, 344-45 (2006).

Deference will be given to counsel's performance in order to “eliminate the distorting effects of hindsight” and the reviewing appellate court must indulge in a strong presumption that counsel’s performance is within the broad range of reasonable professional assistance. *State v. Lopez*, 107 Wn. App. 270, 275 (2001), *aff’d*, 147 Wn.2d 515 (2002). A decision

concerning trial strategy or tactics will not establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78 (1996); *State v. Garrett*, 124 Wn.2d 504, 520 (1994); *State v. McFarland*, 127 Wn.2d 322, 335 (1995).

Here, the Appellant cannot show that his defense counsel failed to provide effective representation. The Appellant's counsel did object to the admission of Exhibit 12 based upon lack of foundation. The State established that the JIS document was from the Appellant's criminal history. RP at 313-14. Upon the Appellant's counsel's objection, the trial court examined Exhibit 12 and overruled the objection. RP at 314.

Now, the Appellant is arguing that his counsel should have objected to the admission of Exhibit 12 for a different reason, a confrontation clause violation. As stated above, this objection would have been overruled because Exhibit 12 does not implicate the confrontation clause. Thus, the Appellant's assertions that an objection to the "printout" would have been sustained is without merit.

E. THE TRIAL COURT DID NOT UNDERMINE THE APPELLANT'S PRESUMPTION OF INNOCENSE.

"A challenged jury instruction is reviewed de novo, in the context of the instructions as a whole." *State v. Bennett*, 161 Wn.2d 303, 307, 165 P.3d 1241 (2007) (citing *State v. Brett*, 126 Wn.2d 136, 171, 892 P.2d 29 (1995)). "The failure of a court to give a cautionary instruction is not error

if no instruction was requested.” *State v. Myers*, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (citing *State v. Hess*, 86 Wn.2d 51, 52, 541 P.2d 1222 (1975)).

Here, the Appellant’s claim that his presumption of innocence was undermined by the trial court’s instructions to the jury was undermined is without merit. The trial court instructed the jury that they could consider a witness’ prior conviction only in deciding what weight or credibility to give that witness’ testimony. RP at 482, WPIC 5.06. This instruction is a correct statement of the law. The jury is permitted to utilize a prior conviction for a crime of dishonesty when evaluating a witness’ credibility. ER 609. Mr. Enfield, a witness for the State, had previous convictions for crimes of dishonesty. RP at 90. Thus, the jury was instructed that they could consider those convictions when evaluating how much weight and credibility to give Mr. Enfield’s testimony.

The Appellant would like this court to ignore the remaining jury instructions and apply this rationale to his own testimony. This would require the court to ignore the jury instructions as a whole. The trial court further instructed the court that “certain evidence has been admitted for a limited purpose. The State has offered Exhibits 12, 14, and 15 as evidence of Element 2 of Count 5. You may consider this evidence solely for this purpose and *for no other purpose.*” RP at 482 (emphasis added). This

instruction directly contradicts what the Appellant has put forward. Exhibits 12, 14, and 15 established the Appellant's assault conviction. The trial court specifically instructed the jury that they were to consider this evidence only for count five and for no other purpose – i.e. credibility. For whatever reason, the Appellant would have this court ignore the instructions as a whole and focus merely upon a single instruction.

Furthermore, the Appellant never requested a further limiting instruction in regards to the assault conviction. Mere speculation would lead us to conclude that no limiting instruction was requested because WPIC 5.05 addresses this issue specifically. "You may consider evidence that the defendant has been convicted of a crime only in deciding what weight or credibility to give the defendant's testimony, and for no other purpose." WPIC 5.05.

The Appellant testified. The Appellant does not have a prior conviction for a crime of dishonesty. Thus, WPIC 5.05 was not used. Mr. Enfield testified. Mr. Enfield has prior convictions of dishonesty. Thus, WPIC 5.06 was given. The State was required to prove the Appellant was previously convicted of assault. The court instructed the jury to only use this evidence for count five. Thus, the jury was properly instructed.

V. CONCLUSION

For the above stated reasons, the Appellant's appeal should be denied.

Respectfully submitted this 5th day of January, 2015.

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CERTIFICATE OF SERVICE

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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 January 5th, 2015.

Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

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