

No. 49067-6-II

Lewis County 14-1-00509-6

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

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STATE OF WASHINGTON,

Appellant,

v.

FELICIA BARNES,

Respondent.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
LEWIS COUNTY

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The Honorable James W. Lawler, Judge

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*BRIEF OF RESPONDENT FELICIA BARNES*

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A. ISSUES PRESENTED IN RESPONSE

1. Has the Appellant State of Washington failed to show that the trial court erred in granting the CrR 7.4 motion to arrest the conviction for possession with intent to deliver where the evidence at trial was insufficient to sustain the verdict?
2. Did the State fail to present sufficient evidence that Ms. Barnes possessed with intent to deliver methamphetamine which was found inside a peanut-butter jar and a closed box under the hood of a car owned and driven by another based on Barnes being a passenger and having a personal-use pipe, \$201 and empty “alien head” baggies in her purse which matched some found with the drugs and a scale?

B. RESPONDENT’S STATEMENT OF THE CASE

1. Procedural Facts

Respondent Felicia R. Barnes was charged by amended information filed in Lewis County with possession of methamphetamine with intent to manufacture or deliver with a school bus route stop enhancement. CP 65-67; RCW 69.50.401(1) and RCW 69.50.401(2)(b); RCW 69.50.434(1). Trial was held before the Honorable Judge James Lawler on February 3, 2015.<sup>1</sup> RP 1. The jury found Barnes guilty as charged. RP 122-29; CP 26-27.

On February 9, 2015, Barnes filed a motion for arrest of judgment. CP 29-31. Judge Lawler granted that motion on March 20, 2016, entering a judgment on the lesser offense of possession of methamphetamine and later entering written findings and conclusions on the motion. RP 117-128; CP 34-37. On April 6, 2016, Judge Lawler imposed a standard-range

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<sup>1</sup>The verbatim report of proceedings consists of three volumes, which are chronologically paginated. The volumes contain the jury trial of February 3, 2016 (mislabelled 2015), the motion hearing of March 20, 2016, and the sentencing of April 6, 2016.

sentence for the possession offense. RP 129-38; CP 38-47. The state appealed and filed an opening brief. See CP 49-64. This Response follows.

2. Testimony at trial

On July 5<sup>th</sup>, at about 3:30 in the afternoon, Centralia Police Department (CPD) Officer Adam Haggerty was at an intersection and saw a “black primer gray early 90’s” car pass by, going the other way. RP 22. The officer would later testify at trial that he noticed the car had a cracked windshield and it seemed to have an “obvious altered system” to the exhaust, because it was very loud. RP 22. According to the officer, he stopped cars for such reasons, so he turned his patrol car around, got behind the other car and activated his lights, causing the other car to stop. RP 22.

Haggerty approached the stopped car on the driver’s side and told the man who was sitting in the driver’s seat why the car had been stopped. RP 23. The officer then “continued. . .enforcement,” asking the driver for his license, registration and proof of insurance. RP 23.

The driver was a man named James Mueller. RP 23. Upon learning that name, Officer Haggerty “[f]lashed back,” because he was familiar with Mueller’s name. RP 23. Haggerty testified at trial that police had “lots of information about him [Mueller] dealing in methamphetamines and commonly having warrants.” RP 23.

Sure enough, when they spoke, Mueller told Haggerty that Mueller probably had a “DOC warrant” out for his arrest. RP 23. The officer confirmed it with a “records check.” RP 23. Haggerty then arrested

Mueller on that felony warrant. RP 23.

Mueller had a passenger with him in the car. RP 24. That passenger, Felicia Barnes, volunteered to remove the car from the road if officers needed and told Haggerty that she had a valid license. RP 24.

The officer was suspicious of anyone who was in a car with Mueller, so he asked Barnes if he could search her purse for drugs. RP 24. Barnes agreed, the officer opened the purse and he found inside “[a] meth pipe, a glass pipe with white residue” and “a plethora of baggies, empty, clean and unused” with a decorative green alien head imprint on them. RP 25. There was also \$201 in currency. RP 25.

Officer Haggerty conceded that, “[a]t times, women will keep their money in their purse, sometimes in small denomination bills” like those Barnes had in her purse. RP 40. The officer said he was still “suspicious,” because Barnes told him she worked as a babysitter. RP 40.

At that point, Officer Haggerty asked Mueller to consent to a search of Mueller’s car. RP 28-29. Haggerty testified at trial that he expected to find something in the motor compartment of the vehicle, based on his knowledge of Mueller. RP 39.

As the officer expected, underneath the hood, in the engine compartment of Mueller’s car, there was a jar of peanut butter and a “smaller toolkit.” RP 29. The peanut butter jar had what the officer said was “a trap compartment,” where there was a digital scale, some empty baggies with alien head designs on them, and some suspected methamphetamine. RP 32. A forensic scientist testified that there were three smaller plastic bags with a total weight of 6.7 grams, which

contained an unknown percentage of methamphetamine. RP 52. Inside the toolkit the officer also found suspected methamphetamine, later weighed to be 10.2 grams of substance which tested also positive for the presence of an unknown percentage of methamphetamine. RP 29, 50. At trial, Officer Haggerty testified that he had interviewed “hundreds of people in my career that’s into the drug world” and they had told him up to a gram and a half a day was “personal consumption.” RP 31. He opined the amounts found under the hood were for “more than personal use.” RP 31-34.

Mueller had a title to the car. RP 39. He told Officer Haggerty that he had just bought the car. RP 39. At trial, the officer conceded that he knew that Mueller was a person who deals in methamphetamine and that Mueller was claiming ownership of the car. RP 39.

At trial, Felicia Barnes explained that she was just an acquaintance of Mueller and they had mutual friends. RP 69. Over about three years, she had seen him probably 20 times and did not really think of him as a friend. RP 74. Barnes had not been to Mueller’s home and did not know where he lived or even if he had a house or apartment. RP 75.

On July 5, Barnes had been at the home of her friend, Dave, when Mueller arrived. RP 69-70. Barnes and Mueller talked a little and he told her about some friends having trouble watching their kids and juggling that with work. RP 71. Barnes agreed to go help with the kids as a babysitter. RP 71-72. Mueller was driving her there when he was pulled over. RP 71-72.

Barnes conceded possession of the pipe in her purse, saying she

had forgotten it was there. RP 72, 74. The baggies had been on the floor of the car on the passenger side when she got in. RP 72. She thought they were cute so she picked them up. RP 72. She admitted she did not ask for Mueller's permission to grab the baggies but said Mueller made no objection when he saw her pick them up. RP 72-73.

Barnes watched the officers as they searched Mueller's car and saw them take things out of the engine compartment. RP 73. She had no idea they were there. RP 73. She did not dispute that she had been in a car with Mueller at some point in the past but had not been in this particular car before. RP 73-74.

At trial, Barnes testified that she had not had contact with Mueller since she was released from jail on the case. In rebuttal, Officer Haggerty testified that "some time this fall" Barnes was encountered at the home of "Scrapper Dave" when police went there looking for Mueller. RP 76-77. The officer said he was told Mueller had just left when officers arrived and they asked for consent to search, finding Barnes in the bathroom inside. RP 77. The officer said Barnes also "had a warrant based on this case" so that was when she was arrested. RP 77.

Shortly after the verdict, Ms. Barnes filed a motion under CrR 7.4, arguing that the evidence was insufficient to prove that she was in possession with intent to deliver the drugs and scale located out of sight in the engine compartment CP 30. The trial court agreed. In its written findings of fact, conclusions of law and order, the court rejected the prosecution's claim that the evidence, viewed in the light most favorable to the state, was sufficient. CP 34-37. Instead, the court found, "there is

not enough here.” CP 37. The court went on:

The fact that Ms. Barnes knew Mr. Mueller is not enough. The vehicle did not belong to her, the controlled substances were not in the passenger compartment. The money is not a very significant amount, and the denominations that are consistent with what a drug dealer would have are also consistent with the money that anyone would have. What we have are the empty baggies that match and that’s it. That is simply not enough.

CP 37. The court vacated the conviction have for possession with intent to deliver, entering a finding of guilt on the “lesser included offense” of simple possession instead. CP 37.

C. ARGUMENT

THE STATE FAILED TO PRESENT SUFFICIENT EVIDENCE TO PROVE POSSESSION WITH INTENT AS REQUIRED AND THE TRIAL COURT DID NOT ERR IN GRANTING THE MOTION FOR ARREST OF JUDGMENT

Both the state and federal due process clauses require the government to shoulder the burden of proving every element of a charged crime, beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); State v. Farnsworth, 185 Wn.2d 768, 374 P.2d 1152 (2016); Fourteenth Amend.; Const. Art. 1, § 3. CrR 7.4, the rule at issue in this case, helps ensure this constitutional mandate by authorizing a trial court to “arrest” a judgment where there is “insufficient proof of a material element of the crime.” CrR 7.4(a).

In this case, the state is appealing the trial court’s decision granting Ms. Barnes’ CrR 7.4(a) motion. The prosecution accuses the trial court of failing to apply the proper standard, improperly weighing the evidence and failing to view it in the light most favorable to the state. Brief of Appellant State (“BAS”) at 6. This Court should reject each of these

arguments in turn.

On review of a trial court's decision on a CrR 7.4 motion, this Court applies the same standard as that applied by the trial court. Id. The issue is whether there is sufficient evidence to support the jury's verdict. See State v. Huynh, 107 Wn. App. 68, 26 P.3d 290 (2001). Evidence is sufficient if, taken in the light most favorable to the state, a rational trier of fact could find the essential elements of the charged crime, beyond a reasonable doubt. State v. Longshore, 141 Wn.2d 414, 420-21, 5 P.3d 1256 (2000).

In this case, the prosecution urges this Court to overturn the trial court's conclusion that the evidence was insufficient to prove that Barnes possessed with intent to distribute or deliver the drugs that were found under the hood of Mueller's car. BAS at 6. The state complains that the trial judge failed in his duties to properly apply the correct legal standard, and urges this Court to reverse. BAS at 6-14.

But the state has failed to show that the evidence was actually sufficient to support the jury's verdict. It presents no argument as to why the evidence below was sufficient as a constitutional matter to support the conviction based upon the elements and how they have been interpreted in the past. BAS at 6-14. Instead, it urges this Court to find that the trial court improperly failed to consider a number of crucial facts in the prosecution's favor and further, improperly weighed the evidence. BAS at 14.

Neither of these claims, however, is true. To understand the fallacy of the state's arguments, it is important to start with what was

required for the state to meet its burden of proof. See, Longshore, 141 Wn.2d at 420; State v. Randecker, 79 Wn.2d 512, 487 P.2d 1295 (1971). This is the relevant starting point because this Court's duty in reviewing the decision below is the same as that of the trial court - to determine whether the evidence was legally sufficient to support the verdict of the jury. See State v. Robbins, 68 Wn. App. 873, 875, 846 P.2d 585 (1993).

In order to prove that Barnes committed the crime of possession of methamphetamine with intent to distribute, the prosecution had to prove beyond a reasonable doubt 1) that the defendant had "possession," 2) that the item possessed was a controlled substance and 3) that the possession was with the intent to distribute the drug. See RCW 69.50.401; State v. Hagler, 74 Wn. App. 232, 235, 872 P.2d 85 (1994). As this Court has noted, "[e]vidence is not sufficient to support a conviction for possession with intent to deliver unless a rational trier of fact could find that the defendant possessed the same [drugs]. . .he intended to deliver." Robbins, 68 Wn. App. at 876. Thus, the prosecution had to prove that Barnes - not Mueller - had "possession" of those drugs and that she did so with the required intent to deliver or distribute.

The prosecution failed to prove that Ms. Barnes had the required "possession with intent." Being as a passenger in the car does not make one automatically guilty of possessing everything inside. State v. Cote, 123 Wn. App. 546, 548, 96 P.3d 410 (2004). This is true even if you are aware of the contraband in the car and could reach it yourself. See State v. Chouinard, 169 Wn. App. 895, 282 P.3d 117 (2012), review denied, 176 Wn.2d 1003 (2013); see State v. Hystad, 36 Wn. App. 42, 49, 671 P.2d

793 (1983).

As this Court has noted, in this state, “courts hesitate to find sufficient evidence of dominion or control” over contraband in a car “where the State charges passengers with constructive possession.” Chouinard, 169 Wn. App. at 899-900.

Thus, in Chouinard, this Court agreed with the defendant that the prosecution had failed to prove the defendant had possession of a rifle behind him in a car after shots were heard fired, even though the defendant was sitting where he could see the gun, was aware of it and could have easily grabbed it. 169 Wn. App. at 898. The Court agreed that the state had only proven “merely his proximity” to the gun and knowledge of its presence - insufficient to prove he had “constructive possession, including dominion and control over the weapon.” Chouinard, 169 Wn. App. at 899-900. The Court distinguished the case from situations where the defendant owned the car and was driving it, or was the sole occupant and had the contraband next to his seat, noting that such evidence was sufficient to prove constructive possession. 169 Wn. App. at 900-901. The Court also pointed to cases where there was evidence that the defendant was seen carrying the contraband, had told police he had carried it from the home of a friend and “handled” it and then transported it in his car, or had it next to him when driving his car and admitted to hiding it from police. 169 Wn. App. at 898.

In State v. George, 146 Wn. App. 906, 919-20, 193 P.3d 693 (2008), the Court addressed the similar crime of mere possession of a controlled substance, a strict liability crime which requires only sufficient

actual or “constructive” possession. In that case, the defendant was found in the back seat of a car and at his feet was a marijuana pipe with burnt marijuana in it. 146 Wn. App. at 912-13. The car had been stopped for speeding and the troopers who stopped it had smelled “the strong odor of burnt marijuana wafting from the vehicle as they approached.” Id. The pipe was not small - 8 inches long and 6 ½ inches wide, among empty beer cans and bottles on the floorboard right next to where the defendant was seated. Id. On review from the defendant’s conviction, the Court rejected the state’s claim of constructive possession, noting that the defendant had not exercised “dominion and control” over the vehicle, did not own it and was merely a backseat passenger. 146 Wn. App. at 919. The Court rejected the idea that “mere proximity to the drugs and evidence of momentary handling” was enough to prove “possession” for the purposes of criminal liability. Id.

And even more is required to prove possession with intent. See, e.g., Cote, 123 Wn. App. at 548-50 (defendant arrested on outstanding warrant after arriving in stolen truck where a syringe and components of a methamphetamine lab were found, including two Mason jars with various chemicals and defendant’s fingerprints; insufficient evidence to prove constructive possession with intent; evidence showed only that he was “at one point in proximity to the contraband and touched it. . . . But this is insufficient to establish dominion and control”).

Even possessing an amount greater than that considered “normal” for personal use is not enough to support an inference of the required “intent” to deliver. See, State v. Zunker, 112 Wn. App. 130, 135, 48 P.3d

344 (2002), review denied, 148 Wn.2d 1012 (2003).

The evidence here was similarly scant to prove that Ms. Barnes was in constructive possession with intent to deliver the drugs under the hood of Mueller's car. Barnes was not the owner of the car. She was not its driver. She was not seen putting anything under the hood, or looking at it. She was not found with the scales or large quantities of drugs or baggies packaged for sale, or notations of sales, or anything of the kind. Instead, Barnes was a passenger in a car with a known drug dealer, and had possession of a personal use pipe and some unused baggies similar to unused baggies found with the hidden drugs. The trial court did not err in holding this insufficient to establish that Barnes was guilty of possessing the drugs under Mueller's hood with intent to deliver.

Huynh, supra, is instructive. In that case, Division One affirmed the trial court's decision granting a CrR 7.4 motion where the evidence was insufficient to establish beyond a reasonable doubt the defendant's intent to deliver. 107 Wn. App. at 72. Unlike here, in that case the defendant was seen in actual possession of the drugs. He was watched by police as he took a "white object wrapped up" from another and started to hand that other man something, but saw police and ran. The package he threw was found to contain 22 grams of "warm, soft cocaine wrapped in a paper towel." 107 Wn. App. at 72. Also found, in the defendant's pocket, outside his wallet, was \$900 in \$100 bills. Id.

At trial the state provided evidence that the street value of the cocaine was almost \$3,000, the temperature and consistency of the cocaine indicated it was "freshly cooked," and that Huynh had no drug

paraphernalia on him when arrested - all evidence the state said proved Huynh was possessing the drugs with intent to deliver and not for personal use. 107 Wn. App. at 72-73. The jury convicted. The trial court then granted a motion to arrest the conviction for possession with intent to deliver under CrR 7.4.

On cross-appeal, the prosecution argued that the trial court should not have granted the CrR 7.4 motion. 107 Wn. App. at 77. Division One disagreed. 107 Wn. App. at 77. The Court first noted that the state had to prove “intent to manufacture or deliver” as an essential element of the crime. 107 Wn. App. at 77. It then pointed out that an inference of intent to deliver requires more than mere possession of contraband, even in large quantities. 107 Wn. App. at 77.

Although the defendant had been in possession of a large quantity of the drug, that was not enough. Nor was the possession plus the officer’s opinions that he believed that Huynh’s intent was to sell cocaine. 107 Wn. App. at 77. The state also relied on the \$900 in his pocket, that the cocaine was recently cooked and that Huynh did not have any paraphernalia in his possession suggesting he was buying for personal use. 107 Wn. App. at 77. The Court found that this evidence was not sufficient “corroborating evidence to support a reasonable inference that Huynh intended to deliver the cocaine.” 107 Wn. App. at 77. The money was explicable as likely going to be exchanged for the drugs, there was no evidence a person buying for personal use would not buy recently cooked product and the fact that he had no pipe may not have indicated personal use but the Court also noted a lack of baggies and other items to indicate

intent to sell. 107 Wn. App. at 77-78.

One significant fact about Huynh that resonates here is that part of the evidence the state relied on in gaining the conviction in the first place was improper opinion from officers designed to fill in the holes on the state's missing evidence to prove the essential "intent" element of the crime. In Huynh, the state presented testimony from officers who "opined that they believed Huynh's intent was to sell[.]" 107 Wn. App. at 73. On review, the Court did not consider those improper opinions as evidence in evaluating the sufficiency of the evidence.

Here, there was similar opinion - and even some misconduct - at trial. Both the state and federal constitutions guarantee the right to trial by jury. State v. Lane, 125 Wn.2d 825, 838, 889 P.2d 929 (1995); Sixth Amend.; Art. I, § 21. As part of these rights, a person accused of a crime is entitled to have jurors serving as sole judges of the evidence, including the weight of the testimony and credibility of witnesses. 125 Wn.2d at 838. These rights are violated when a witness gives their opinion about the defendant's guilt, veracity or credibility - or the veracity or credibility of any witness. State v. Montgomery, 163 Wn.2d 577, 591-94, 183 P.3d 267 (2005). An officer's improper opinion is especially harmful because it is well-recognized that the testimony is given a high aura of reliability by jurors. 163 Wn.2d at 591.

There was never any question that Barnes was a passenger in Mueller's car, or that drugs, a scale and baggies with alien heads were found inside the peanut butter jar and the box hidden under the hood of his car. The crucial issues below were whether the state could prove that

Barnes had constructive possession of those drugs with intent to deliver as a passenger based on simply being with Mueller, having a personal use pipe and empty, new “alien heads” bags in the passenger compartment, from which the drugs and items under the hood most assuredly could not been seen. And the improper opinion here all went directly to those questions and the lack of proof by the state.

Below, the prosecutor asked the officer to opine about what evidence “meant,” eliciting Officer Haggerty’s opinion that having clean, unused baggies in “larger quantities, to me, it is indicative that there’s drugs in the mix being sold or something being distributed with the baggies,” and that the number of baggies found in this case was such a “larger” quantity. RP 27. Next, the prosecutor asked the officer to explain his opinion on Barnes having \$201 in her wallet in “twenties, tens, fives, and at least one one-dollar bill.” RP 28. The following exchange occurred:

Q: Is that significant in any way to the dealing with drugs [sic]?

A: At times when they were commingled, yes.

Q: And how is that so?

A: When you have smaller amounts of drugs being sold, smaller amounts of money are being exchanged for them. And again, if you marry them up with narcotics and paraphernalia, it’s a good sign there’s drugs being sold in the mix.

RP 28. When the officer was asked by counsel why he was “suspicious” about Barnes having \$201 in her purse in small denomination bills, the officer volunteered that it was “[u]nusual for people **I know to be in the**

**drug world** to be baby-sitting small children” making it clear he “knew” that Barnes was in the drug world. RP 40 (emphasis added). And the officer was gave his opinion that the amount of drugs found under the hood of the car was “very much” for more than personal use, “[s]ignificantly more,” and the following exchange occurred:

[PROSECUTOR]: Does that type of amount clue you in that something might be happening?

A: Yes.

Q: And what is that?

A: Somebody’s selling methamphetamine.

Q: And what led you to that conclusion?

A: The totality of the circumstances, the amount in the toolkit married in with the baggies that I had previously found in the purse.

RP 31-32. The officer also said that he had on “rare occasions” seen a scale on someone he had arrested “that just had a user amount,” but “it is used in the sale of narcotics,” the officer said, “when you have larger user amounts, a bunch of unused baggies, and the scale together.” RP 34.

At trial, the prosecutor also repeatedly tried to establish some relationship between the defendant and Mr. Mueller who was driving the vehicle, in an apparent effort to convince the jury to convict Barnes based on who she was with and his reputation as a “dealer.” RP 36. Counsel objected repeatedly to questions about whether Barnes and Mueller were in a relationship. RP 36-38. Counsel’s objections were repeatedly sustained, and the jury was told by the court to “disregard the last comment about the nature of their relationship.” RP 38. Even then the

prosecutor persisted, “[b]ut they knew each other very well?” RP 38. The officer’s response, “[y]es,” was again objected to and again the objection was sustained. RP 38.

Later in closing argument, the prosecutor highlighted the improper opinion of the officer in urging jurors to find the state had met its burden of proving possession with intent:

Now, this part has several moving parts because it’s rare that somebody is going to say that they possessed a substance and they were going to sell it.

So, I want you to think back in first when I asked you in jury selection if you could conclude what a person was going to do with a number of ingredients, the flour, the sugar, brown sugar, the eggs, and we all agree that if you had those items out on the counter it was reasonable to conclude that you were going to make chocolate chip cookies. In fact, nobody disagreed with that conclusion.

So, the way that translates to this case **comes from the testimony of Officer Haggerty. I’d just highlight his training and experience as a law enforcement officer in this particular arena, three years with the special crimes unit.**

RP 97 (emphasis added). The prosecutor then relied on Haggerty’s opinions 1) that “a typical user amount is a quarter of a gram,” 2) that scales like those found under the hood are used “to weigh out whatever you’re selling, in this case methamphetamine, to allow you to get to that quarter gram, which is the user amount,” 3) the “plastic baggies” which were “key in the case,” because they are used to divide things up and were “clean,” because there was “no testimony that they had any other types of substance in them prior to Officer Haggerty finding them,” 4) that Barnes having the same baggies in her purse “ties her to the baggies that were found in the hood of the car,” 5) and the “large amounts of money” i.e., the

\$201 in smaller denominations that Haggerty had “explained. . .were consistent with smaller purchases or methamphetamine and the State would submit to you that’s where the money came from.” RP 97-98.

These arguments give illumination to how the jury could have been improperly swayed to convict in this case, despite the absence of legally sufficient proof of possession with intent.

Indeed, during closing argument, the prosecutor also misstated the crucial burden of proof, saying it was not “beyond absolute certainty” or “100 percent,” but “an abiding belief in the truth of the charge[.]” RP 100. The prosecutor went on:

It doesn’t say you’re absolutely certain, if the State has removed any possible doubt whatsoever. It’s if you have an abiding belief in the charge. If you believe the defendant is guilty, she’s guilty.

RP 100. At that point, the trial court felt compelled to halt things:

THE COURT: Well, I’m going to stop you. I’m going [to] reread the instruction because the last comment “if you believe the defendant is guilty” is an improper statement of the law. Let me read this to you again.

RP 100. The court then reread the instruction on reasonable doubt. RP 100-101.

The significant amount of improper opinion testimony below all went directly to the crucial question of whether the state had met its burden of proving that Ms. Barnes had possession with intent to deliver the drugs found under the hood of Mueller’s car. It explains how, despite the dearth of sufficient evidence, a conviction could have occurred. And like in Huynh, where the state presented testimony from officers who evaluated the evidence for the jury and then “opined that they believed

Huynh's intent was to sell," the improper opinions of Officer Haggerty here cannot be used to support a finding of sufficient evidence to prove the essential elements of possession with intent. See, e.g., Huynh, 107 Wn. App. at 73.

The prosecution has failed to show that the trial court erred in granting the CrR 7.4 motion below. It has failed to show that the evidence was, in fact, sufficient under the relevant caselaw and statute. Instead, it faults the trial court as having improperly weighed the evidence and failed to take it in the light most favorable to the state. The prosecution claims the judge "improperly weighed the evidence" by finding that the \$201 in Barnes' purse did not support the state's claim of proof of "intent to deliver." BAS at 10-11. The state also argues that the trial court did not properly consider the evidence in the light most favorable to the state because it did not consider "the long term relationship between Barnes and Mr. Mueller, even if it was just a casual relationship," and the "persuasive power" of Barnes having the same kind of baggies in her purse as were found in the peanut butter jar under the hood. BAS at 10-12. Finally, the state says, the trial court somehow ignored that the drugs found in the engine compartment were "not an amount commonly associated with personal use" and that there were scales also found under the hood. BAS at 10-12.

In making these claims, the state cites no cases showing that having \$201 in 10s and 20s is evidence of being involved in drug dealing. BAS at 10-11. Further, the trial judge made explicit findings considering the very facts that the state claims went unconsidered. Those findings

discuss Haggerty's experience, training and opinions. They include the officer's knowledge of Mueller's history of selling narcotics, that Barnes had the pipe in her purse, that the officer thought that \$201 in a purse was proof of dealing activity, that the officer thought the presence of the same unused, clean baggies without drugs in them in the peanut butter jar and in Barnes' purse was somehow enough to show that she was personally in constructive possession of the drugs Mueller had in his car. CP 35-36. The court also specifically mentioned that Barnes was impeached at trial with her prior convictions and her claims of not having seen Mueller much, and that Barnes had known Mueller for about three years. CP 35-36. As the drafter of those findings the state surely was aware of them. See CP 37. And it has not challenged them on review.

The prosecution's problem is not that the trial court failed to consider the evidence the state presented in the correct light. It is that the court properly concluded that, even taken in that light, the evidence was not enough for the state to prove that Barnes, the passenger, was criminally responsible for possessing with intent the hidden drugs under Mueller's hood. The trial court did not "weigh" conflicting evidence and fail to construe it in the light most favorable to the state, it looked at the evidence in that light and found it still wanting. The state has presented no caselaw or statutory analysis or anything to prove that the evidence was, in fact, sufficient.

The trial court did not err in concluding that the state had failed to present sufficient evidence to prove possession with intent to deliver below. At best, the state proved that Barnes was in possession of the

residue in the pipe, and the trial court's decision to enter a verdict on simple possession was proper. Because there was insufficient evidence to support the conviction for possession of methamphetamine with intent, Appellant has failed to show that this Court should grant it relief. This Court should affirm the trial court and deny the state's arguments that the evidence was sufficient below.

D. CONCLUSION

The prosecution has failed to show that the trial court erred in granting the CrR 7.4 motion below. There was insufficient evidence to prove that Felicia Barnes was in possession of the drugs found under the hood of Mueller's car or that she had possession with intent. The trial court did not err in granting the motion and entering the verdict on the lesser included crime of possession. This Court should so hold and should affirm.

DATED this 17th day of March, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Response Brief to opposing counsel VIA this Court's upload service, at [Sara.Beigh@lewiscountywa.gov](mailto:Sara.Beigh@lewiscountywa.gov), and to appellant Felicia Barnes, DOC 339360, Mission Creek Corr Center- Women, 3420 N.E. Sand Hill Road, Belfair, WA. 98528.

DATED this 17th day of March, 2017

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**RUSSELL SELK LAW OFFICES**  
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