

FILED  
Court of Appeals  
Division II  
State of Washington  
10/7/2019 2:07 PM

NO. 53370-7-II

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

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STATE OF WASHINGTON,

Respondent,

v.

VICTOR W. SPRAGUE,

Appellant.

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BRIEF OF APPELLANT,  
VICTOR W. SPRAGUE

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR COWLITZ COUNTY  
THE HONORABLE MICHAEL H. EVANS, JUDGE

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STEPHANIE TAPLIN  
Attorney for Appellant  
Newbry Law Office  
623 Dwight St.  
Port Orchard, WA 98366  
(360) 876-5567

LAURA E. YELISH  
Attorney for Appellant  
Yelish Law  
1740 Pottery Ave., Ste 205  
Port Orchard, WA 98366  
(360) 876-9900

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## I. INTRODUCTION

On November 14, 2018, the Longview Police Street Crimes Unit served a search warrant on Victor W. Sprague at his home. Detectives found 10.21 grams of methamphetamine, a digital scale, and a pipe with residue. Although Detectives noted a plastic grocery bag lining a trashcan, they did not find indications that Mr. Sprague was packaging methamphetamine for sale or delivery. On the morning of trial, the state provided new information of a controlled buy against Mr. Sprague by the state's key witnesses. Mr. Sprague's request for a continuance based on the new information was denied, and the court proceeded to trial.

Mr. Sprague was convicted by a jury of possession of methamphetamine with the intent to deliver. The jury also found the special verdict of delivery within 1000 feet of a school zone.

This case was replete with errors. The trial court erred by denying Mr. Sprague's motion to dismiss and motion to continue the trial. Additionally, insufficient evidence supported Mr. Sprague's conviction because the state failed to prove intent to deliver. This Court should reverse.

## II. ASSIGNMENTS OF ERROR

Assignment of Error 1: The trial court erred when it denied Mr. Sprague's request for a trial continuance when the state disclosed, on the morning of

trial, that the state's witnesses had conducted a controlled buy on Mr. Sprague before the incident on November 14, 2018.

Assignment of Error 2: The Court erred when Mr. Sprague's motion to dismiss was denied when the independent evidence was not sufficient to corroborate Mr. Sprague's incriminating statements under the corpus delicti rule.

Assignment of Error 3: Insufficient evidence supported Mr. Sprague's conviction for possession of methamphetamine with intent to deliver.

Assignment of Error 4: Mr. Sprague was denied effective assistance of counsel because his attorney was unable to adequately advise Mr. Sprague when new information was provided the morning of trial.

Assignment of Error 5: Cumulative error prevented Mr. Sprague from having a fair trial.

### **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

Issue 1: Did the trial court err by denying Mr. Sprague's request for a trial continuance after the state disclosed, on the morning of trial, that the state's witness had conducted a controlled buy on Mr. Sprague before the incident on November 14, 2018?

Issue 2: Did the trial court err by denying Mr. Sprague's motion to dismiss when the independent evidence was not sufficient to corroborate Mr. Sprague's incriminating statements under the corpus delicti rule?

Issue 3: Was there insufficient evidence to support Mr. Sprague's conviction when the state failed to prove beyond a reasonable doubt that Mr. Sprague possessed methamphetamine with the intent to deliver?

Issue 4: Was Mr. Sprague denied effective assistance of counsel when his attorney was unable to adequately advise him after the state presented new information on the morning of trial?

Issue 5: Did cumulative error prevent Mr. Sprague from having a fair trial?

#### **IV. STATEMENT OF THE CASE**

On November 14, 2018, the Longview Police Street Crimes Unit served a search warrant at 1219 Commerce Ave #2, Longview, in Cowlitz County, WA. CP 6. The warrant allowed for the search of the apartment of Victor Sprague for illegal narcotics and related contraband. CP 17. Mr. Sprague answered the knock and announce, was handcuffed, and was detained. RP 78-79, 81-82.

During the search of the living room, detectives found two baggies with a white crystalline substance, weighing 8.80 grams and 1.41 grams respectively. CP 12. The cumulative amount of methamphetamine found was less than half an ounce. RP 110. Both baggies were field tested and presumptively tested positive for methamphetamine. CP 23 and 150. Detectives also located a pipe and a digital scale in the living room. CP

17, 20, and 71. RP 15, 17, 123, 129, 136, 140, and 149. Detectives noted several “Safeway style” plastic grocery bags in the residence, one of which was lining a trashcan. RP 17, 103, 147, 148. Detectives did not find any cash, checks, ledgers, safes, locked containers, small baggies, torn bags, or text messages regarding sale or delivery. RP 17, 23, 25, 104, and 188.

After police read him his Miranda Rights, Mr. Sprague admitted that the methamphetamine located by detectives belonged to him. RP 207. Mr. Sprague also admitted to selling methamphetamine. RP 237.

On November 19, 2018, the state charged Mr. Sprague with possession of a controlled substance with intent to deliver. CP 4-5. The state also alleged that he lived near a school bus stop, adding an enhancement to this charge. *Id.*

The Court heard a motion to dismiss on March 11, 2019. Mr. Sprague alleged that the state was unable to provide sufficient corroborating evidence to establish corpus delicti of possessing methamphetamine with intent to deliver. CP 11-17 and 62-70; RP 123 and 188. The trial court denied Mr. Sprague’s motion to dismiss, indicating that in the light most favorable to the nonmoving party, the corpus delicti rule was satisfied by the amount of methamphetamine found

at the residence, the presence of the digital scale, and the presence of the whole Safeway bags. CP 28.

Several law enforcement officers testified during trial. Detectives Sanders, Ripp, and Mortensen testified that they assisted in serving a search warrant at 1219 Commerce Avenue on November 14, 2018. RP 95, 114, and 126. Detective Sanders testified that half an ounce of methamphetamine, or approximately 14 grams, is consistent with the amount typically found on a dealer. RP 101 and 110.

Victoria Giles testified to the existence of a bus stop at 1157 Commerce Ave. located at Kinderland Daycare. RP 181. Anita Hyatt testified about the technology law enforcement uses to measure distances. RP 212. She testified that she used geographical information software to draw a 1000-foot boarder around Kinderland Daycare and placed a yellow numbered notation at 1219 Commerce Avenue. RP 171. Ms. Hyatt also testified that the yellow notation was well within the 1000-foot circle drawn around the school zone surrounding Kinderland Daycare. RP 171.

The jury convicted Mr. Sprague of possession of methamphetamine with intent to deliver. CP 92. The jury found the special verdict of delivery within 1000 feet of a school zone. CP 94.

Mr. Sprague's sentencing hearing took place on March 25, 2019. Because of his criminal history, his standard range was 60 months to 120

months for the possession with intent to deliver. CP 95. The special verdict of delivery within 1000 feet of a school zone has a mandatory 24-month consecutive sentence. CP 98. The trial court sentenced Mr. Sprague to a total of 89 months, 65 months on the charge of possession with intent to deliver and 24 months consecutive for delivery within 1000 feet of a school zone. CP 113-126. Mr. Sprague appeals. CP 112.

## V. ARGUMENT

Numerous errors denied Mr. Sprague a fair trial in this case. The trial court erred by denying Mr. Sprague's motion to dismiss. The evidence was insufficient to establish corpus delicti or guilt because the state failed to prove intent to deliver. The trial court also erred by denying Mr. Sprague's motion to continue when the state disclosed critical evidence on the morning of trial. This error resulted in Mr. Sprague's attorney providing ineffective assistance at trial. This Court should reverse.

### A. **The State Failed to Establish Corpus Delicti for Possession with Intent to Deliver.**

Before trial, Mr. Sprague filed a motion to dismiss. CP 11-17. He argued that the state failed to present sufficient evidence to establish corpus delicti of possession with intent to deliver. *Id.* The trial court denied his motion and the case proceeded to trial. RP 25-26.

The trial court erred and must be reversed, for two reasons. First, the court applied the incorrect test for corpus delicti. The court refused to apply two Washington Supreme Court cases—*State v. Brockob*, 159 Wn.2d 311, 150 P.3d 59 (2006) and *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996)—after incorrectly deciding that they conflicted with a Court of Appeals decision, *State v. Hotchkiss*, 1 Wn. App.2d 275, 404 P.3d 629 (2017). Second, applying the correct test, the state failed to meet its burden of establishing corpus delicti for intent to deliver. The trial court acknowledged this explicitly, stating that “if we follow [*Brockob*] . . . the defense wins under [*Brockob*].” RP 25.

**1. The trial court erred by refusing to apply the test for corpus delicti articulated by *Brockob* and *Aten*.**

“Corpus delicti means the ‘body of the crime.’” *Brockob*, 159 Wn.2d at 327 (internal quotations omitted). To prove corpus delicti, the state must prove that a crime occurred. *Aten*, 130 Wn.2d at 655. A defendant’s incriminating statement alone cannot establish corpus delicti; the state must present independent corroborating evidence. *State v. Cardenas-Flores*, 189 Wn.2d 243, 258, 401 P.3d 19 (2017). Under the corpus delicti rule, “an uncorroborated confession is insufficient evidence to sustain a conviction as a matter of law.” *Id.* at 257 (quoting *State v. Gorgan*, 158 Wn. App. 272, 275, 246 P.3d 196 (2010)). This rule exists to

prevent unjust convictions based solely on false confessions. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).

Appellate courts review de novo whether sufficient corroborating evidence exists to satisfy corpus delicti. *State v. Green*, 182 Wn. App. 133, 143, 328 P.3d 988 (2014). In making this determination, courts view the evidence in the light most favorable to the state. *Aten*, 130 Wn.2d at 658. The corroborating evidence by itself need not be sufficient to support a conviction; it must only support a logical and reasonable inference that the charged crime has occurred. *Id.* at 656.

Many jurisdictions have adopted the more relaxed corpus delicti rule used by federal courts. *Brockob*, 159 Wn.2d at 328. Washington, however, has specifically declined to do so. *Id.* (citing *Aten*, 130 Wn.2d at 662-63). In Washington, the rule is more stringent in three respects. First, to establish corpus delicti, “the evidence must independently *corroborate*, or confirm, a defendant’s incriminating statement.” *Id.* at 328-29 (emphasis in original). It is insufficient to merely show that the incriminating statement was trustworthy. *Id.* at 328. Second, this independent evidence must corroborate “not just *a crime* but *the specific crime* with which the defendant has been charged.” *Id.* at 329 (emphasis in original).

Third, in Washington the independent evidence “‘must be consistent with guilt and inconsistent with a[ ] hypothesis of innocence.’” *Aten*, 130 Wn.2d at 660 (quoting *State v. Lung*, 70 Wn.2d 365, 372, 423 P.2d 72 (1967)). Evidence fails to establish corpus delicti if it supports “‘reasonable and logical inferences of both criminal agency and noncriminal cause.’” *Id.* In other words, “‘if the evidence supports both a hypothesis of guilt and a hypothesis of innocence, it is insufficient to corroborate the defendant’s statement.’” *Brockob*, 159 Wn.2d at 330 (citing *Aten*, 130 Wn.2d at 660-61).

The trial court in this case refused to apply the corpus delicti rule articulated by the Washington Supreme Court in *Brockob* and *Aten*. RP 22, 24, 25. Specifically, the court rejected the holding in *Brockob* and *Aten* that where there are “‘equally plausible explanations, the criminal [and] the noncriminal explanation [for independent evidence] . . . that’s not sufficient” to establish corpus delicti. RP 22, 24.

Instead, the trial court applied a Court of Appeals decision, *Hotchkiss*, 1 Wn. App.2d 275. RP 25-26. The court interpreted this decision as applying a less robust corpus delicti rule. *Id.* Applying *Hotchkiss* instead of *Brockob* and *Aten*, the trial court denied Mr. Sprague’s motion to dismiss. RP 24-26. However, the court acknowledged, “‘if we follow [*Brockob*] . . . the defense wins.” RP 25.

The trial court erred because *Hotchkiss* does not conflict with *Brockob* and *Aten*; it merely applies the corpus delicti rule to a charge of possession with intent to deliver. In that case, police executed a warrant at Mr. Hotchkiss's residence. *Hotchkiss*, 1 Wn. App.2d at 277. They found a safe containing a large quantity of methamphetamine and over \$2,000 in cash. *Id.* Mr. Hotchkiss admitted that the drugs and cash were his, and that he was selling methamphetamine. *Id.* However, at trial he testified that the cash was from collecting rent. *Id.* at 278. Mr. Hotchkiss argued that the state failed to prove corpus delicti of possession with intent to deliver because he provided an innocent explanation for the cash found in his home. *Id.*

The Court of Appeals disagreed. *Id.* at 282. The Court acknowledged that “possession of a controlled substance standing alone cannot constitute sufficient corroborating evidence of an intent to deliver.” *Id.* at 281 (citing *State v. Cobelli*, 56 Wn. App. 921, 925, 788 P.2d 1081 (1989); *State v. Whalen*, 131 Wn. App. 58, 63, 126 P.3d 55 (2005)). Corpus delicti requires “at least one additional factor, suggestive of intent.” *Id.* at 281 (quoting *Whalen*, 131 Wn. App. at 63). The Court found that the large quantity of cash, found in a locked safe with a large amount of methamphetamine, was sufficient evidence to establish corpus delicti of intent to deliver. *Id.* at 281-82.

This holding is consistent with both *Brockob* and *Aten*. The Court rejected only the narrow interpretation of these cases advanced by Mr. Hotchkiss, not their holding. *Id.* at 285-86. It is not “consistent with a hypothesis of innocence” to store thousands of dollars in a locked safe with a large amount of methamphetamine. *See Brockob*, 159 Wn.2d at 329. Instead, this money in this location was “suggestive of intent” to deliver, satisfying corpus delicti. *See Whalen*, 131 Wn. App. at 63.

The trial court erred by refusing to apply *Brockob* and *Aten*, and instead applying only *Hotchkiss*. As explained above, these cases are not in conflict. However, even if they did conflict, the trial court still erred. Once the Washington Supreme Court has decided an issue of state law, “that interpretation is binding on all lower courts until it is overruled by [the Washington Supreme Court].” *State v. Gore*, 101 Wn.2d 481, 486-87, 681 P.2d 227 (1984). The trial court should have applied the holding in *Brockob*, and its refusal to do so is reversible error. *See id.* This Court should reverse and remand with instructions to apply the corpus delicti rule articulated in *Brockob* and *Aten*.

**2. The state failed to establish corpus delicti because the evidence in this case was consistent with Mr. Sprague’s innocence.**

Applying the correct test for corpus delicti, the trial court should have dismissed the charge against Mr. Sprague. To establish corpus

delicti of possession with intent to deliver, the state must present evidence of “at least one additional factor, suggestive of intent.” *Whalen*, 131 Wn. App. at 63. Evidence that is consistent with “both a hypothesis of guilt and a hypothesis of innocence” is insufficient to establish corpus delicti. *Brockob*, 159 Wn.2d at 330. To be suggestive of intent, the evidence must corroborate “not just *a crime*” but “*the specific crime*” charged—here, possession with intent to deliver a controlled substance. *See id.* at 329.

In other words, the evidence must corroborate not just any crime, or even any drug-related crime, but specifically intent to deliver. *See id.* Evidence that is equally consistent with intent to deliver and personal use does not meet this threshold. *See id.* at 330. Possession of a large quantity of drugs alone, even more than the amount for typical personal use, is not sufficient to establish corpus delicti. *Hotchkiss*, 1 Wn. App.2d at 281.

Here, the state failed to meet the “one additional factor, suggestive of intent” test. Instead, the state’s evidence was at least as consistent with mere possession as it was with intent to deliver. The trial court acknowledged this, stating that “the pipe” found in Mr. Sprague’s residence, was “suggestive of personal use.” RP 25. The court added, “no money, no safe, no pay/owe [sheets], no texts, that’s suggestive of personal use . . . the scale with residue [could] equally be for personal use [or for] weighing out an amount to be sold to another individual.” *Id.*

The only evidence suggesting intent to deliver was the quantity of the drugs and “having something to package [drugs] up into such as a Safeway bag.” *Id.* As explained above, a large quantity of drugs, without more, cannot establish corpus delicti. *Hotchkiss*, 1 Wn. App.2d at 281.

That leaves just the Safeway plastic bags. Contrary to the trial court’s conclusion, possessing Safeway bags alone is not suggestive of an intent to deliver drugs. Allegedly, plastic bags can be torn or burned to package smaller quantities of drugs. RP 139. However, the bags in Mr. Sprague’s home were not torn or burned. RP 139, 151. One bag was lining his trash can. RP 151. Police found no evidence that Mr. Sprague used the bags to package drugs. RP 139, 151. This distinguishes the case from *Hotchkiss*, where the corroborative evidence—over \$2,000 in cash—was found in the same locked safe as methamphetamine. 1 Wn. App.2d at 277. Unlike in *Hotchkiss*, here there was no evidence connecting the bags to dealing drugs.

Absent some connection between the bags and selling methamphetamine, plastic Safeway bags alone cannot establish corpus delicti of intent to deliver. Otherwise, practically every household in Washington has evidence “suggestive of intent” to deal drugs in our kitchen cupboards. The trial court did not disagree with this reasoning but applied a different test. RP 24-26. Under the correct corpus delicti test,

the court acknowledged that the state failed to present sufficient evidence of intent to deliver. RP 25 (“if we follow [*Brockob*] . . . the defense wins”). This Court should apply the proper test, adopt the trial court’s reasoning, and reverse.

**B. Insufficient Evidence Supported Mr. Sprague’s Conviction.**

The state also presented insufficient evidence to convict Mr. Sprague. Specifically, the state failed to prove beyond a reasonable doubt that Mr. Sprague possessed methamphetamine with intent to deliver. In order to convict, the state cannot rely on possession of drugs alone; it must also prove at least one additional factor, suggestive of intent to deliver. The state failed to meet this burden because, aside from his statements, the evidence showed that Mr. Sprague possessed methamphetamine for his personal use. This Court should reverse.

**1. In order to convict, “at least one additional fact” must support an intent to deliver.**

“The State must prove every element of a crime beyond a reasonable doubt for a conviction to be upheld.” *State v. Sibert*, 168 Wn.2d 306, 311, 230 P.3d 142 (2010) (quoting *State v. Byrd*, 125 Wn.2d 707, 713, 887 P.2d 396 (1995)). To determine whether sufficient evidence supports a conviction, courts view the evidence in the light most favorable to the state and determine whether any rational trier of fact could have

found the elements of the crime beyond a reasonable doubt. *State v. Homan*, 181 Wn.2d 102, 105, 330 P.3d 182, 185 (2014).

A claim of insufficient evidence admits the truth of the state's evidence and all reasonable inferences that can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Appellate courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

The elements of possession of a controlled substance with intent to deliver are (1) unlawful possession (2) with intent to deliver (3) a controlled substance. RCW 69.50.401(1). A fact finder may infer an intent to deliver where the evidence shows both possession and facts suggestive of a sale. *State v. Hagler*, 74 Wn. App. 232, 236, 872 P.2d 85 (1994). Evidence of an intent to deliver must be sufficiently compelling that "the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." *Delmarter*, 94 Wn.2d at 638.

Mere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an

inference of intent to deliver. *State v. Lopez*, 79 Wn. App. 755, 768, 904 P.2d 1179 (1995). At least one additional fact must exist, such as a large amount of cash or sale paraphernalia, suggesting an intent to deliver. *Hagler*, 74 Wn. App. at 236 (large amount of cocaine and \$342 sufficient to establish intent to deliver); *State v. Lane*, 56 Wn. App. 286, 297-98, 786 P.2d 277 (1989) (one ounce of cocaine, large amount of cash, and scales sufficient to establish intent to deliver).

Washington cases where intent to deliver was inferred all require at least one additional factor, beyond possession. Several cases resulted in reversal when an additional factor was not found. For example, in *State v. Brown*, a conviction for possession with intent to deliver was reversed and remanded where the accused had no weapon, no substantial sum of money, no scales or drug paraphernalia, the cocaine was not separately packaged, and officers had not observed any actions suggesting delivery. 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). In *Cobelli*, officers observing Mr. Cobelli in “an area known for frequent drug transactions” and confiscated several baggies of marijuana adding up to 1.4 grams. 56 Wn. App. at 923. This evidence was insufficient to support the inference of intent to deliver. *Id.* at 924-25. In *State v. Davis*, police discovered six baggies of packaged marijuana, two baggies of seeds, a film canister containing marijuana, a baggie with marijuana residue in it, and a box of

sandwich baggies. 79 Wn. App. 591, 595-96, 904 P.2d 306 (1995). The Court of Appeals reversed, holding that this evidence was insufficient to establish that “Mr. Davis had bought or sold marijuana or was in the business of buying or selling.” *Id.* at 595.

By contrast, courts have held that the presence of contraband, together with large sums of money or packaging and processing materials, sufficiently support a finding of intent to deliver. In *State v. Llamas-Villa*, possession of cocaine, heroin, a handgun, and \$3,200, combined with an officer’s observations of deals, supported the inference of intent to deliver. 67 Wn. App. 448, 451, 836 P.2d 239 (1992). In *State v. Simpson*, the large amount of uncut heroin found in defendant’s bedroom, balloons with heroin found on his person, a cut balloon found under the bed, and an unusual amount of lactose found in his oven supported the inference of intent to deliver. 22 Wn. App. 572, 575-76, 590 P.2d 1276 (1979).

In other words, Washington courts have recognized that the quantity of drugs, the presence of large amounts of cash, and the nature of packaging, among other circumstances, can support an inference of possession with intent to deliver. *See Simpson*, 22 Wn. App. at 575-76. As explained below, the state failed to meet its burden of proving one additional factor suggestive of intent in this case.

**2. The state failed to prove intent to deliver beyond a reasonable doubt in this case.**

Here, no rational trier of fact could find beyond a reasonable doubt that Mr. Sprague possessed methamphetamine with intent to deliver because the corroborating evidence in this case showed only his personal use. This Court should reverse because the state failed to prove an additional factor establishing intent to deliver. *Brown*, 68 Wn. App. at 485.

As in *Brown*, *Davis*, and *Cobelli*, the only evidence beyond Mr. Sprague's statements show personal use. Mr. Sprague was in a private residence with a relatively small amount of methamphetamine. CP 67. Detective Sanders testified that 14 grams of methamphetamine is consistent with an amount that would tend to indicate delivery. RP 101, 110. However, police only found 10.21 grams of methamphetamine in Mr. Sprague's residence. RP 110, 140. Even if this amount was more than typical for personal use, "[m]ere possession of a controlled substance, including quantities greater than needed for personal use, is not sufficient to support an inference of intent to deliver." *State v. O'Connor*, 155 Wn. App. 282, 290, 229 P.3d 880 (2010).

This other evidence in this case also does not support an intent to deliver. Washington cases where intent to deliver was inferred from the

possession of a quantity of drugs all involved at least one additional factor, although most included several additional factors. *See Llamas-Villa*, 67 Wn. App. at 451 (possession of cocaine, heroin, a handgun, and \$3,200 sufficient to establish intent to deliver); *Simpson*, 22 Wn. App. 575-76 (possession of a large amount of uncut heroin, balloons with heroin, a cut balloon, and an unusual amount of lactose found in the oven sufficient to establish intent to deliver); *Hagler*, 74 Wn. App. at 236 (large amount of cocaine and \$342 sufficient to establish intent to deliver); *Lane*, 56 Wn. App. at 297-98 (one ounce of cocaine, large amount of cash, and scales sufficient to establish intent to deliver).

The state pointed to the digital scale with residue as the “additional factor.” RP 19-20. Unlike in the cases cited above, this evidence does not establish intent to deliver because it is consistent with personal use. Detective Mortensen testified that “it’s not uncommon for a user or an addict to have a scale.” RP 150.

This case is also distinguishable from *Llamas-Villa*, *Hagler*, and *Lane* because police did not find any money or records of sales and did not observe a controlled buy. Here, Detectives Sanders, Ripp, and Mortensen all testified that they did not log any money or photographs of money during the search. RP 104, 115-116, 148. Mr. Sprague had no cards

indicating payment. RP 17. He had no drugs divided into smaller amounts or packaged for sale. *Id.*

Detective Sanders testified that he typically looks for letters, ledgers or names of ledgers, cash, and separate compartments such as a safe when looking for evidence of sale of methamphetamine. RP 103, 105. However, he did not find any log entries, books or receipts, notes or letters, ledgers or names of ledgers, cash, or a safe during the search of Mr. Sprague's residence. RP 104. Detective Mortensen testified that he typically looks for baggies, pay-and-owe sheets, and money when looking for evidence of sale of methamphetamine. RP 125. Again, he did not log any money, photos of money, or pay-or-owe sheets into evidence. RP 148. Detective Ripp testified that he did not log any evidence during the search. RP 115-116. Here, there was no additional evidence of a locked container or safe. RP 105. Police found no text messages or phone calls suggesting that Mr. Sprague sold methamphetamine and did not observe a sale. RP 17, 23, 25, 104, 188.

This case is also distinguishable from *Simpson* because police found no packaging in Mr. Sprague's residence. Although a plastic Safeway bag was lining a trashcan, plastic bags were not ripped into smaller pieces for packaging. Detective Mortensen explained that dealers sometimes tear plastic bags to package methamphetamine for delivery and

tie them in a knot or burn it to seal it. RP 139. Detective Mortensen testified that he did not find any little bags that were tied in a knot or sealed by burning. RP 151. He testified that he did not log any ripped-up bags into evidence or see any photos of ripped up bags from the residence. RP 151. Detective Mortensen also testified that he observed a plastic grocery bag in a garbage can, used as a garbage liner. RP 147. Detective Sanders also testified that he did not find little bags or torn up plastic grocery bags in the residence. RP 103.

In *Simpson*, police found clear evidence that Mr. Simpson was packaging drugs for sale. Police found balloons filled with heroin, a cut balloon, and a large amount of lactose used for cutting heroin. *Simpson*, 22 Wn. App. 575-76. Here, the state established no connection between the Safeway bags and the methamphetamine. Bags were not torn or burned, and there was no evidence Mr. Sprague was using the plastic bags for packaging. RP 139, 151. This case is similar to *Davis*, where Mr. Davis was arrested with six baggies of packaged marijuana, two baggies of seeds, a film canister containing marijuana, a baggie with marijuana residue in it, and a box of sandwich baggies. 79 Wn. App. 595-6. In that case, the Court found insufficient evidence of intent to deliver. *Id.*

Without any connection to drugs, common household items like plastic bags cannot establish intent to deliver. The state failed to present

corroborating evidence of intent to deliver in this case. Instead, the evidence presented showed innocence as strongly as it showed guilt. This Court should reverse because possession of Safeway bags, without more, cannot sustain a conviction for intent to deliver methamphetamine.

**C. The Trial Court Erred by Denying Mr. Sprague's Motion to Continue.**

The trial court also erred by denying Mr. Sprague's motion to continue trial. The state disclosed new evidence on the morning of trial. RP 34. Mr. Sprague moved for a continuance, but the court denied his request. RP 29, 34, 44. This Court should reverse because the trial court abused its discretion.

The right to a fair trial is a fundamental liberty secured by the United States and Washington Constitutions. U.S. Const. amend.s VI, XIV; Wash. Const. art. I, § 22; *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999). Failure to grant a continuance may “deprive a defendant of a fair trial and due process of law, within the circumstances of a particular case.” *State v. Williams*, 84 Wn.2d 853, 855, 529 P.2d 1088 (1975) (citing *State v. Cadena*, 74 Wn.2d 185, 443 P.2d 826 (1968)).

Whether the denial of a continuance rises to the level of a constitutional violation requires a case by case inquiry. *State v. Downing*,

151 Wn.2d 265, 275, 87 P.3d 1169 (2004). Reviewing courts will not disturb the trial court's denial unless this decision was "manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Id.* at 272-73 (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)). "In exercising discretion to grant or deny a continuance, trial courts may consider many factors, including surprise, diligence, redundancy, due process, materiality, and maintenance of orderly procedure." *Id.* at 273 (citing *State v. Eller*, 84 Wn.2d 90, 95, 524 P.2d 242 (1974); RCW 10.46.080; CrR 3.3(f)).

Here, the trial court's failure to grant a continuance was manifestly unreasonable when the state provided counsel with new information on the morning of trial. The state informed Mr. Sprague that the detectives testifying in his trial completed a controlled buy prior to executing the search warrant. RP 29. Mr. Sprague's attorney expressed concern about how this information could impact the present case:

MS. WALLACE: I was informed yesterday afternoon by the lead detective in today's case that the Street Crimes Unit has done a controlled buy on the defendant prior to this case occurring.

MS. HALLS: . . . I absolutely would want more information. I don't even have like, you know, a probable cause statement or anything to even talk about – you know, to my client about this information, and this is brand new this morning.

RP 29-30. Additionally, only limited information about this buy was available at the time:

THE COURT: Is there a probable cause statement that's available to the defense? RP 32-33.

MS. WALLACE: As of right now, no.

RP 33. Counsel immediately requested a continuance to review the probable cause statement and discuss the new information with Mr. Sprague to formulate a defense:

MS. HALLS: Your Honor, I'm asking for a continuance of this case. This has totally – I think totally affects Mr. Sprague's constitutional rights for effective representation. Our entire approach to this case and this trial is affected. It affects his constitutional right to present a defense. I'm asking for a continuance.

RP 36. Despite this, the trial court denied a continuance.

The trial court's failure to grant a continuance amounted to an abuse of discretion. The state surprised Mr. Sprague with new information on the day of trial. Defense counsel made it clear that she could not do her job without additional time to investigate. As explained below, she was unable to provide effective assistance without a continuance. Under these circumstances, the trial court's denial of a continuance deprived Mr. Sprague of a fair trial and due process of law, requiring reversal. *See Downing*, 151 Wn.2d at 275.

**D. Mr. Sprague was denied effective assistance of counsel.**

This Court should also reverse because Mr. Sprague was denied effective assistance of counsel. Both the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S.Ct. 2052 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996).

Washington has adopted *Strickland's* two-pronged test for evaluating whether a defendant had constitutionally sufficient representation. 466 U.S. 668 (1984); *State v. Cienfuegos*, 144 Wn.2d 222, 226, 25 P.3d 1011 (2001). Under *Strickland*, the defendant must show both (1) deficient performance and (2) resulting prejudice to prevail on an ineffective assistance claim. 466 U.S. at 687. “[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.” *Strickland*, 466 U.S. at 696. Here, both requirements are met.

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**1. Counsel’s performance was deficient when reasonable trial counsel would have investigated the new information provided by the state on the morning of trial.**

Performance is deficient if it falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Performance is not deficient if counsel’s conduct can be characterized as legitimate trial strategy or tactics. *Id.* at 863.

Courts have held that counsel’s performance was deficient (1) when counsel failed to call witnesses he determined would provide testimony material to the defense, *State v. Weber*, 137 Wn. App. 852, 858, 155 P.3d 947 (2007), *review denied*, 163 Wn.2d 1001 (2008); and (2) when “counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available.” *In re Pers. Restraint of Monschke*, 160 Wn. App. 479, 490, 251 P.3d 884 (2010) (quoting *State v. Jury*, 19 Wn. App. 256, 263, 576 P.2d 1302 (1978)). For example, in *Jury*, the Court held that counsel’s failure to “adequately acquaint himself with the facts of the case by interviewing witnesses [and] failure to subpoena them . . . were omissions which no reasonably competent counsel would have committed.” 19 Wn. App. at

264. Counsel performs deficiently when the failure to call a necessary witness is not a matter of trial strategy. *Id.* at 265 n.1.

Here, counsel's performance fell below an objective standard of reasonableness based on consideration of all the circumstances above. Counsel was unable to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available in light of the new information provided on the morning of trial. RP 29-30. Counsel informed the trial court that she could not effectively represent Mr. Sprague without a continuance:

MS. HALLS: I cannot effectively represent my client without having everything in front of me. I feel like I would be ineffective if I was not able to have this continuance at this time. He is at a big risk. He's at a higher offender score. And I do strong think that this affects my ability to represent him in a negatively impactful way.

RP 34. Thus, counsel's actions were not a matter of trial strategy, and counsel performed deficiently. *See Jury*, 19 Wn. App. at 265 n.1.

A defendant's right to effective assistance also extends to plea negotiations. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S.Ct. 1376 (2012); *State v. Edwards*, 171 Wn. App. 379, 393-94, 294 P.3d 708 (2012). Defense counsel must actually and substantially assist a client in deciding whether to plead guilty. *State v. Osborne*, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). Counsel must communicate actual offers, discuss tentative

plea negotiations, and discuss the strengths and weaknesses of the defendant's case so that the defendant knows what to expect and can make an informed decision on whether to plead guilty. *State v. James*, 48 Wn. App. 353, 362, 739 P.2d 1161 (1987). Counsel must, at a minimum, "reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty." *State v. A.N.J.*, 168 Wn.2d 91, 111-12, 225 P.3d 956 (2010).

Here, Mr. Sprague's attorney could not "reasonably evaluate the evidence" pertinent to a plea because the state disclosed new information on the morning of trial. *Id.* Counsel did not have time to discuss the strengths and weaknesses of Mr. Sprague's case so that he could make an informed decision. *James*, 48 Wn. App. at 362. Mr. Sprague's attorney performed deficiently because she could not adequately represent him at trial and in plea negotiations.

## **2. Counsel's deficient performance prejudiced Mr. Sprague.**

Mr. Sprague also suffered prejudice. Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A "reasonable probability" is lower than

a preponderance but more than a “conceivable effect on the outcome.” *Strickland*, 466 U.S. at 693-94. It exists when there is a probability “sufficient to undermine confidence in the outcome.” *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017).

Here, the state provided new information on the morning of trial, pertaining to both Mr. Sprague and the state’s key witnesses. RP 29-30. Mr. Sprague’s counsel had hardly any time to investigate this information. This affected trial strategy, counsel’s ability to question witnesses, and counsel’s ability to present evidence. It also undermined counsel’s ability to discuss this new information with Mr. Sprague and explain his options. As explained above, counsel was unable to reasonably advise Mr. Sprague about a possible plea. Under these circumstances, there is a reasonable probability of a different outcome if the trial court had provided Mr. Sprague’s attorney with sufficient time to investigate.

**3. The state denied Mr. Sprague fundamental fairness in these proceedings by surprising him with new information the morning of trial.**

The Fourteenth Amendment requires that criminal prosecutions conform with prevailing notions of fundamental fairness and that criminal defendants be given a meaningful opportunity to present a complete defense. *State v. Wittenbarger*, 124 Wn.2d 467, 474, 880 P.2d 517 (1994) (citing *California v. Trombetta*, 467 U.S. 479, 104 S.Ct. 2528 (1984)). In

*State v. York*, the Court found “as a matter of fundamental fairness” the defense should have been allowed to cross-examine for “negative characteristics of the one most important witness” when the state sought to introduce the positive characteristics. 28 Wn. App. 33, 37, 621 P.2d 784 (1980).

Here, Mr. Sprague was denied a meaningful opportunity to present a complete defense under the requirements set forth in *Wittenbarger*:

THE COURT: How does it impact his ability to present a defense in the facts alleged in this matter if it's a different date range?

MS. HALLS: It's close to the range that's alleged in the Information and in the warrant. It's close also with the same law enforcement officers that are being dealt with. It is – it also brings into question the question of the confidential informant in the warrant as well, whether they're reliable on a suppression issue. I think it just raises – actually, it actually raises more questions for me and, you know, to even assess the case and to be able to properly and effectively advise Mr. Sprague . . . It could affect the way I would cross-examine the officers involved in this case. They're the same officers here.

RP. 37. Mr. Sprague's attorney needed adequate time to prepare a defense, present all relevant evidence, and cross-examine the state's witnesses. By denying his continuance request, the trial court denied Mr. Sprague “a meaningful opportunity to present a complete defense.”

*Wittenbarger*, 124 Wn.2d at 474. This Court should reverse as a matter of fundamental fairness. *See York*, 28 Wn. App. at 37.

**E. Cumulative Error Prevented Mr. Sprague from Having a Fair Trial.**

Even if each of the errors described above are not sufficient for reversal, their cumulative effect denied Mr. Sprague a fair trial. This Court should reverse and remand because of the pervasiveness of the errors in this case.

Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless. *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Under the cumulative error doctrine, a defendant may be entitled to a new trial when several errors produce a trial that is fundamentally unfair. *See, e.g., State v. Coe*, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) (accumulated errors, including permitting inadmissible evidence and prosecutorial discovery violations, required reversal); *State v. Alexander*, 64 Wn. App. 147, 158, 822 P.2d 1250 (1992) (reversal required because (1) a witness impermissibly suggested the victim's story was consistent and truthful, (2) the prosecutor impermissibly elicited the defendant's identity from the victim's mother, and (3) the prosecutor repeatedly attempted to introduce inadmissible testimony during the trial and in closing); *State v. Whalon*, 1 Wn. App.

785, 804, 464 P.2d 730 (1970) (reversing conviction because (1) court's severe rebuke of the defendant's attorney in the presence of the jury, (2) court's refusal of the testimony of the defendant's wife, and (3) jury listening to tape recording of lineup in the absence of court and counsel).

In this case, the errors made by the trial court each warrant reversal. However, even if each error standing alone is harmless, the accumulation of these errors deprived Mr. Sprague of a fair trial. *See Coe*, 101 Wn.2d at 789. This Court should reverse. *State v. Venegas*, 155 Wn. App. 507, 526-27, 228 P.3d 813 (2010).

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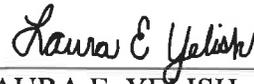
## VI. CONCLUSION

Victor Sprague's conviction for possession of methamphetamine with intent to deliver must be reversed. Independent evidence was not sufficient to corroborate Mr. Sprague's incriminating statements under the corpus delicti rule and the motion to dismiss was improperly denied. Insufficient evidence supported Mr. Sprague's conviction for possession of methamphetamine with intent to deliver when the only evidence independent of Mr. Sprague's admissions beyond his mere possession show personal use. The trial court erred when Mr. Sprague's request for a continuance was denied. Mr. Sprague was denied effective assistance of counsel. Finally, cumulative error denied Mr. Sprague a fair trial.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of October, 2019.



STEPHANIE TAPLIN  
WSBA No. 47850  
Attorney for Appellant,  
Victor W. Sprague



LAURA E. YELISH  
WSBA No. 48127  
Attorney for Appellant,  
Victor W. Sprague

No. 53370-7-II

CERTIFICATE OF SERVICE

I, Stephanie Taplin, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct to the best of my knowledge:

On October 7, 2019, I electronically filed a true and correct copy of the **Brief of Appellant, Victor W. Sprague**, via the Washington State Appellate Courts' Secure Portal to the Washington Court of Appeals, Division II. I also served said document as indicated below:

Aila Rose Wallace ( X ) via email to:  
Cowlitz County Prosecutor's Office WallaceA@co.cowlitz.wa.us  
312 SW 1st Ave, Rm 105  
Kelso WA 98626-1799

Victor W. Sprague ( X ) via U.S. mail  
DOC # 288832  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

SIGNED in Port Orchard, Washington, this 7<sup>th</sup> day of October,

2019.



STEPHANIE TAPLIN  
WSBA No. 47850  
Attorney for Appellant, Victor W.  
Sprague  
Newbry Law Office  
623 Dwight St.  
Port Orchard, WA 98366  
(360) 876-5567

**NEWBRY LAW OFFICE**

**October 07, 2019 - 2:07 PM**

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**Appellate Court Case Number:** 53370-7  
**Appellate Court Case Title:** State of Washington, Respondent v. Victor W. Sprague, Appellant  
**Superior Court Case Number:** 18-1-01573-9

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