

**FILED**

OCT 09, 2012

Court of Appeals  
Division III  
State of Washington

No. 30645-3-III

COURT OF APPEALS, DIVISION III  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent

v.

DANIEL MATZ

Appellant

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APPEAL FROM THE SUPERIOR COURT  
FERRY COUNTY  
HONORABLE ALLEN C. NIELSON

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BRIEF OF RESPONDENT

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### **RESPONSE TO ASSIGNMENTS OF ERROR**

1. Appellant was not entitled to a unanimity instruction
2. Appellant's counsel was not ineffective
3. There was no cumulative error
4. The Judgment and Sentence does contain clerical errors that are easily remedied.

### **STATEMENT OF THE CASE**

After trial, a jury convicted Dan Matz of selling drugs from his house from at least January 8, 2011, through June 16, 2011. During his testimony, Deputy Talon Venturo told the jury about confidential informants, how they are used, what steps are taken to ensure that the CI is not setting up the police or the target and specifically about how Jeremy Regan was recruited and handled. Testimony of Venturo, generally. During his testimony, Regan made it clear that he decided to work with police because he had overdosed. RP 330:14-16. Although he was working off potential possession charges associated with his overdose, Regan was motivated by the fact that people were dying – that he had almost died – and people were laughing about it. RP 331:12-20. Regan admitted that Matz had been one of the ones that laughed at him, but he did not accuse Matz of selling him the drugs he overdosed on. RP 375-75; 378. Regan denied that he ever sold Matz 'bad speed' or that he urinated on himself out of fear of Matz, but admitted previously selling Matz marijuana. RP

366-67.

On January 8, 2011, Deputy Venturo and Deputy Rainer conducted a controlled buy from Matz at his residence in Ferry County. RP 155; 367. Venturo arranged the location for the meeting and Regan was thoroughly searched before and after the buy, which resulted in the purchase of controlled substances. RP 155-163. Additional buys were conducted using the same protocols on April 25, 2011 and June 7, 2011. RP 163-179. Again, Regan went into Matz's house empty and came out full.

On June 16, 2011, a search warrant was served on Matz's residence. RP 184. Matz was arrested and a number of other people present at the house were detained or arrested for possession of controlled substances, warrants or stolen goods. The defense statement of facts adequately states who was found, where and with what. A loaded syringe was found in Matz's possession and loaded syringes were found in the possession of others present at the time of the arrest. RP 221 (Matz); 228 (Lance Torres); 264 (Carrie Leslie).

### ARGUMENT

1. **The Jury Was Properly Instructed as to Possession with Intent to Manufacture or Deliver Heroin**

- a. The Evidence is Sufficient to Support a Conviction for Possession of a Controlled Substance with Intent to Manufacture of Deliver.

The Defendant urges this Court to rule that delivery and

manufacturing are alternative means of committing a crime, and that there is proof of only one means in this case. Thus, Defendant argues that a unanimity instruction was required and one was not given. Clearly, a criminal defendant has a right to a unanimous verdict. Wash. Const. Art. I § 21. There are circumstances where a criminal defendant is entitled to a unanimity instruction on the means by which the crime was committed. *State v. Ortega-Martinez*, 124 Wn.2d 702, 707, 881 P.2d 231 (1994). The threshold test is whether sufficient evidence exists to support each alternative means submitted to the jury. *Id.* At 707-08. Here, the Defendant cites no case establishing that possession with intent to deliver and possession with intent to manufacture are alternative means under RCW 69.50.401, but the court need reach that issue, because there is ample evidence here to support a conviction under both prongs.

The Defendant testified at trial, and his counsel argued, that the individual baggies of heroin in his pocket, each weighing approximately one gram, were for personal use. RP 570, 681. The Defendant claimed that the heroin was weak and he had calculated the one-gram weight as a dosage. RP 572. The State argued that this heroin was packaged for sale and that the large chunk of heroin in the Defendant's other pocket was what he was going to keep for his personal use. RP 663. Neither the State's argument nor the Defendant's argument are evidence, and the jury was entitled to listen to one, the other or neither. The Defendant concedes that there is evidence of possession with intent to deliver, pointing to the

individually-packaged baggies of heroin. However, there was considerable evidence that the Defendant intended to take either that heroin (the State's theory at trial) or the other heroin (the Defendant's theory at trial) and repackage it for sale in syringes.

The Defendant owned the house and resided there. RP 157. He kept a large number of syringes in the residence. RP 305. He also kept scales for the weighing of product and he kept baggies and syringes for the packaging of product. Preparing and packaging are "manufacturing". RCW 69.50.010(p). At the time of the Defendant's arrest, a large number of other people were in the residence or in vehicles outside the residence. Many of these people had syringes in their possession.

During his testimony, Matz admitted that he had purchased 33 grams of heroin from a dealer the night before the arrest. And he claimed that he always kept his drugs on his person because the people who came to his house could not be trusted not to steal it. However, at the time of arrest, the Defendant had only 13 grams of heroin left.

Mere possession of a controlled substance is generally insufficient to establish possession with intent to deliver or possession with intent to manufacture a controlled substance. *State v. McPherson*, 111 Wn.App. 747, 759, 46 P.3d 284 (2002). Something more is required. Convictions for possession of controlled substances with intent to manufacture or deliver are routinely affirmed where one or more of the following factors are present: large amounts of cash; scales; cell phones; address lists;

mixing vessels; empty drug packaging materials; pagers; cutting agents.

McPherson, 111 Wn.App. at 759-61; State v. Zunker

- b. There Was a Legitimate and Reasonable Trial Strategy Which Supports the Decision of Matz's Attorney to Request Admission of the Search Warrant Affidavit.

There is a strong presumption that defense counsel's performance is within the broad range of professional assistance. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The test for ineffective assistance of counsel is whether: (1) defense counsel's performance fell below the objective standard of reasonableness; and (2) this deficiency prejudiced the defendant. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice results when it is reasonably probable that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Lord*, 117 Wn.2d 829, 883-84, 822 P.2d 177 (1991). "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt." *Strickland v. Washington, supra*, 466 U.S. at 699. An example of ineffective assistance would be where a defense attorney fails to bring pretrial motions to exclude evidence of prior convictions and fails to object to questioning regarding crimes that may have been excludable. *State v. Shaver*, 116 Wn.App. 375, 65 P.3d 688 (Div. III, 2003). That is a circumstance where there would be no legitimate strategy involved. The instant case is

different; there were legitimate reasons for the defense attorney to want that document in evidence.

It was the defense theory at trial that Jeremy Regan (the Confidential Informant) was unreliable, that police should not have used him, or that they should have taken more steps to corroborate what he was telling them. RP 672:24-673:8. The defense attorney's closing argument was essentially a challenge to the work of the CI and the efforts of police to corroborate what Regan was telling them. RP 672:24-681:2. The defense attorney actually referred to the search warrant affidavit during his closing argument, pointing out that although Deputy Venturo had signed it under oath, the information provided by Regan was not under oath. RP 678:25-679:14.

There is a very strong presumption that defense counsel's performance is not deficient. If the jury did not trust the CI, if they did not believe he was handled properly, if they did not believe this was a thorough investigation, then the jury might acquit on the delivery charges. The majority of the defense closing argument was based on that theory. RP 670-685. By admitting the search warrant affidavit, the defense established what the police investigation consisted of – in other words, a jury could conclude that if it was done and it was important, it would be in that document. That gave the defense the opportunity to poke holes in the investigation and show, and argue, what was NOT done.

The case that was built up before the actual service of the search

warrant and the arrest of Matz on June 16, 2011, was based solely upon purchases of narcotics by Mr. Regan. In the vernacular of drug buys, on each of the three dates in question, Mr. Regan went into Matz's house empty and he came out full. The defense made Regan the focus, pointing out that Regan was allegedly afraid of Matz and reason to dislike him, and that there were other people in the residence at the time the drug buys took place. That history was not in the search warrant affidavit, so the defendant could argue that was information the police did not know, that the CI had not revealed. The search warrant affidavit made clear what information Regan had provided and by allowing the affidavit into evidence, the defense made it appear they had nothing to hide.

The defense position was essentially that Mr. Regan was unreliable, that he had an axe to grind, that he made all this up – that the real drug dealer was Julie Meyer, whom Regan had once called 'Mom'.  
RP 371:6-7.

The admission of the affidavit also put the defense in a position where they could impeach Regan or any of the police officers if there was any deviation from that document, and it could be done in front of the jury using a document that the defendant had himself offered. In light of the overwhelming evidence that was offered in this trial, attacking the credibility of the informant and challenging the procedures used by the police (including the choice of Regan as an informant) were the only real options available.

Matz now claims that the admission of the search warrant affidavit prejudiced him specifically as to Count III (the April 25, 2011, delivery). However, Matz's attorney used the affidavit during closing to impeach Regan's credibility on that very transaction by pointing out that when he was not under oath, Regan had told Deputy Venturo that he bought heroin from Matz. RP 678:25-679:14. Defense counsel contrasted what Regan had previously told Venturo with what Regan testified to under oath during trial. *Id.* This is effective argument based upon the evidence, it was intended not only to undermine the jury's confidence in that April 25, 2011, delivery, but on Regan's credibility on all the buys -- and it relied upon the information contained in the search warrant affidavit. Contrary to Matz's argument on appeal, the defense offering of the search warrant bolstered the defendant's credibility and adversely affected Regan's credibility.

c. Matz's Attorney Was Not Ineffective For Not Objecting To State's Questioning re: Basis of CI's Knowledge.

As indicated above, there is a strong presumption that defense counsel is not deficient. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Matz asserts that his attorney was deficient because he chose not to object when the State asked Regan "Why did you believe you could buy these substances from him?" RP 333. Perhaps not artfully phrased, the question was intended to establish the confidential

informant's basis of knowledge and lack of personal bias, and was not offered for the truth of the matter asserted. Assuming for the moment that the question was objectionable, the question then becomes whether there was some reasonable tactic at work which would explain why counsel did not object.

First, the question was not the same as the one asked previously, to which defense counsel did object, so counsel was not asleep at the switch. This question went more to the reasons why this CI was going to work Matz's case, and therefore went more to potential bias. As covered above, the defense's primary theory was that Regan was biased against Matz for a prior slight, and that he was unreliable. The defense attorney's cross examination of Regan pointed out a prior incident where Regan had allegedly sold "bad speed" to Matz and that Matz had confronted him about it. RP 366:17-367:10. The defense theory was that Regan claimed he bought heroin from Matz in an effort to get back at him; so a question that allows Regan to give a motive that can then be impeached would be one that defense counsel may very well want to get into evidence.

d. The Defendant Opened the Door To Questions About Overdoses at his Residence.

Matz complains that being asked about overdoses at his house was error, but the Court should consider the question in context because Matz opened the door.

In his opening statement, defense counsel claimed that when Matz

brought people into his home "...he was having friends come over that were sick, didn't have any place else to go, and they're withdrawing, and in bad shape, he would allow them to come to his residence – seeking shelter from the storm. He wanted to provide them a safe place." RP 145:6-10. Counsel then went on to say: "But he's saying that was for his own personal use, and he never, ever dealt drugs." RP 145: 19-20. Then, during direct examination, the following exchange occurred between Matz and his counsel:

Q. Okay. Okay. Okay.

Do you sell drugs to people?

A. Nope. I've had too much trouble – just about, like, I mean, now, only it didn't happen. I've been accused before, or had people try. And – luckily I turned them down.

Q. Okay. Why did you turn them down?

A. Well, usually I don't have nothing, and – I don't – That's not what I do. I don't want people coming and going from my house looking for drugs. I mean, they do anyway; it's bad enough. If I sold the damn things they'd never go away.

Q. How do you feel about people using illegal drugs?

A. Well, it depends on how you use them, I guess. I mean, -- I mean, I – I don't feel bad about people using illegal drugs if they take care of their family and their children, and stuff. If

they're slobs, and just, you know, and don't provide for your family and stuff, I ain't got no use for --.

RP 575:21-576:14. On cross, the following exchange occurred.

Q. Now you say that you don't really particularly care if people use illegal drugs, right?

A. Not really.

Q. You don't care if they use illegal drugs at your house?

A. Well, I didn't say that.

Q. You don't care if they use illegal drugs at your house, do you?

A. Yes, I do.

Q. Do you care if they overdose at your house?

A. Well, Jesus, I hope so.

Q. Has that ever happened?

A. No.

RP 584-85. At that point, the State asked again whether anyone had overdosed at the house, and Matz admitted that "one kid" might have overdosed. RP 585:1-8.

Matz's attorney told the jury that Matz ran a "safe house"; a "harbor from the storm". During his own testimony, Matz claimed that he did not want people using illegal drugs at this house, and that he did not sell drugs because he would not be able to get rid of the addicts if he did sell. But on June 16, 2011, he was caught red-handed with his pockets full

of drugs packaged for sale, with more packaging materials handy and more heroin and other drugs on his person. Matz was not running a safe house, and his testimony to that effect opened the door to asking him what actually happened at his house. Then he denied the question whether anyone had overdosed, and that allowed further inquiry.

The judge's explanation of why he allowed the testimony does not constitute an abuse of discretion. The judge did not say that the testimony was relevant only to Count X. To the contrary, the judge ruled it was relevant even though it was outside the time frame charged in Count X. This is consistent with Matz having opened the door to inquiries about what happened at his house, because defense counsel argued this issue during opening and he answered those questions on direct examination and even volunteered information beyond what his counsel asked.

e. The Evidence Was So Overwhelming That Any Error was Harmless

A defendant is entitled to a trial free from prejudicial error, not one that is totally free of any error. *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83 (1981), *citing*, *State v. White*, 72 Wn.2d 524, 531, 433 P.2d 682 (1967). In raising this issue, the State does not concede error. The State's position is that any errors were not cumulative and that looking at the untainted evidence, the evidence overwhelmingly supports the jury verdict.

The jury had the opportunity to hear and see Jeremy Regan at trial. More importantly, perhaps, they got to hear from Matz himself via a tape-

recorded controlled buy. The officers all testified as to their conduct during the investigation and the steps they took. Three buys were staged, and Matz does not deny being present at his residence on each occasion. Then, when the warrant was served, Matz is present with the most drugs on his person, with sheets showing amounts owed, with scales and packaging materials, in a house full of people carrying drugs that matched what Matz was carrying. The evidence overwhelmingly supports a jury determination that Matz was dealing on that day, that he intended to manufacture and deal more, and that he had been doing so during the charged period.

- f. The State concedes clerical error in the Judgment and Sentence.

The State concedes to the issues asserted by Matz re: clerical errors in the Judgment and Sentence. The matter should be remanded solely for corrections to the Judgment and Sentence.

### CONCLUSION

Pursuant to the points and authorities cited herein, the defendant's convictions should be affirmed in all respects and the matter remanded for clerical correction in the Judgment and Sentence.

Respectfully submitted this 8th day of October, 2012.

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PROOF OF SERVICE

I, Cynthia Nelson, do hereby certify under penalty of perjury that on October 8, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of:

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