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MAY 28, 2015
Court of Appeals
Division III
State of Washington

NO. 31501-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ARTURO LUNA HUERTA,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

1. The trial court violated Appellant's right and the public's right to an open and public trial.
2. The evidence was insufficient to sustain Appellant's convictions for Possession of a Controlled Substance with Intent to Deliver and Involving a Minor in Drug Dealing.
3. The prosecutor impermissibly amended the charges during closing argument.
4. The court erred when it allowed testimony regarding "buy money."
5. The State committed misconduct.
6. Cumulative error.

B. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The right to a public trial was not violated.
2. There was sufficient evidence to support the conviction.
3. There was no "constructive" amendment of the charges "during closing argument."
4. The court properly allowed testimony pertaining to the "buy money."
5. The State did not commit misconduct.
6. There was no cumulative error.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in appellants brief therefore, pursuant to RAP 10.3(b); the State shall not set forth an additional facts section. The State shall refer to the record as needed.

III. ARGUMENT.

The actions of the trial court were well within its discretion, were based on the rules of evidence and case law.

RESPONSE TO ISSUE ONE

This issue was addressed by the Washington State Supreme Court in State v. Andy, 182 Wn.2d 294, 340 P.3d 840 (Wash. 2014), which determined that there was not violation of Andy's rights based on a nearly identical fact pattern. The record in this case was supplemented with the verbatim report of proceedings from Andy as well as the findings and conclusions entered by the trial court after the hearing in Andy. Based on the record before this court there can be no other determination other than the rights of Huerta, as with Andy, were not violated. Andy at 305-6:

When defendants assert public trial rights violations, they have the burden to show that a courtroom closure occurred. In this case, the trial judge made findings of fact that the courthouse was open at all times during Andy's trial and that the sign regarding courthouse hours did not deter the public from attending Andy's trial. Those findings of fact were supported by substantial evidence, including testimony by security officers. On this record, Andy has not shown that a closure occurred. We affirm his conviction.

RESPONSE TO ISSUE TWO

The CI was searched by a detective prior to the CI's participation in the drug transaction. This is done to insure that the items that are later

recovered were in fact supplied by the seller, in this instance the Appellant. (RP 204) The CI was issued \$1200 in \$100 bills. These bills had been “xeroxed” so that the serial numbers were recorded.

Female juvenile was not just holding the money, Det. Horbatko testified that as soon as the vehicle that juvenile was in stopped in the parking lot of the Walmart both she and the driver got out and purposefully looked around the area. This was characterized as “counter surveillance.” (RP 238-9)

The defendant was carrying a red item when he left his vehicle and when he entered the CI’s vehicle, this red item that the detective believed was “a red cup.” (RP 238)

As the defendant moved towards the “CI’s” (Confidential Informant) he was accompanied by the juvenile. However before they reached the vehicle the juvenile; “...kind of peeled off a little ways and walked to the south while looking around and then stop maybe 20, 25 yards from the vehicle that they arrived in. And I couldn't remember if it's, like, one of those shopping cart things where they all put the shopping carts or if it was some kind of a planting strip or a light post, but I remember her standing by one of those and continue looking around.” (RP 240)

When the defendant left the CI's vehicle he was no longer in possession of the item described as "a red cup." (RP 240-1)

After Appellant exited the CI's car, both he and the juvenile moved back to the vehicle they arrived in, reentered that vehicle in the same positions they had been in when they arrived, Appellant in the driver's seat, juvenile in the passenger seat. (RP 241)

It was noted that the female, the juvenile, did not enter the Walmart store while the Appellant was in the CI's vehicle. (RP 241)

When the Detective met moments later with the CI he was handed a "McDonald's fry box" that was red in color. Inside that container was a bag which contained "two eightballs and one half ounce of methamphetamine approximately." (RP 242) These controlled substances were in three separate "parcels." The detective testified that "There 2 was two about the size of a -- an ounce is about the size 3 of an egg and an eightball is about the size of, like, a 4 large marble would be or like a large olive, and there 5 were two of those with it, as well....Along with one \$100 bill." (RP at 243)

The \$100 was "some of the marked bills buy money." (RP 243) The detective was able to confirm the authenticity of the money because before the money was given to the CI he had Xeroxed 12 \$100 bills one of those bills was the bill that was in with the drugs which were turned over

to the detective by the confidential informant after the transaction had occurred. The CI was again searched and there were no other monies or drugs found. (RP 249-50)

Other officers pulled over and stopped the vehicle containing the Appellant and the juvenile female. She was identified as Suzanna Rodriguez. (RP 250) While the officers were waiting to get a search warrant for the car that was driving to and from the drug deal by Appellant the detective had Ms. Rodriguez searched by a female officer. That officer returned to the location of the detective a very short time later “with 11 \$100 bill.” That money was turned over to the detective. The money was checked to determine if it was the “buy money” it was found to be the money that was previously issued to the CI. (RP 251-52)

A search warrant was obtained and the vehicle driven by Appellant was searched. In front of the passenger seat there was a McDonald’s bag and at the bottom of that was a balled up piece of foil...(the detective) peeled the foil back and there were two additional eightballs of crystal substance.” (RP 253-54) An “eightball” is “three point five grams” so called [b]ecause it’s one-eighth of an ounce...” The total weight of these additional items was “seven point three grams” and was in plastic sandwich type bags. (RP 254) Also found in the car under the front seat were “two different parcels” that weighed approximately three grams.

This is known as a “teener” because it is one-sixteenth of an ounce. (RP 255-6)

The substances were sent to the Washington State Patrol Crime Laboratory and analyzed the result was that substance was found to be methamphetamine. One item weighed “13 point eight grams” one contained “three point three grams” and the last tested item contained “one point seven grams.” (RP 296-8)

When the juvenile female was subsequently taken to be searched “she then reached in her bra and she pulled out a wad of money.” The officer believe that it was “about \$1100.” (RP 417-18)

The female juvenile testified that she did not remember much, but what she did remember is that she went to the Walmart to buy an item and in fact went into the store. (RP 448-9) She agreed that this particular Walmart is approximately 84 blocks from her home at the time and that there was another Walmart and numerous other stores that were actually closer to her home. (RP 450-1) This contradicted what the Detective testified to. (RP 241) The female testified that at the time of the arrest she knew Appellant and that Appellant knew that she was 16 at that time. RP 450 She further indicated that while in the jail she yelled out to the Appellant that she “loved him.” (RP 451-2) She also admitted that she had \$1,100 tucked into her bra. (RP 452.) Upon further questioning by

Appellant's trial counsel the juvenile stated that she really had no idea why she had the money. (RP 453)

To prove count I the State needed had to supply evidence that "On or about May 31, 2012, in the State of Washington, with intent to deliver methamphetamine, a controlled substance, you knowingly possessed such substance." (CP 95, 122) To prove Count II the state was required to prove that "On or about May 31, 2012, in the State of Washington, you compensated, threatened, solicited, or in any other manner involved a person under the age of 18 years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance, Methamphetamine." (CP 95, 126)

As can be seen from the facts set forth above Appellant argument that the State did not present sufficient evidence that he possessed the methamphetamine with the intent to deliver it is without merit. This court will review a claim of insufficient evidence for whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." State v. Yarbrough, 151 Wn.App. 66, 96, 210 P.3d 1029 (2009) (citing State v. Rempel, 114 Wn.2d 77, 82, 785 P.2d 1134 (1990)). A sufficiency challenge admits the truth of the State's evidence and all reasonable inferences therefrom. State v. Theroff, 25 Wn.App. 590, 593, 608 P.2d 1254, aff'd, 95 Wn.2d 385, 622 P.2d 1240 (1980).

Intent to deliver may be inferred 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). Mere possession of a controlled substance, including quantities greater than needed for personal use, is insufficient to support an inference of intent to deliver. Hagler, 74 Wn.App. at 235-36. At least one additional fact, such as a large amount of cash or sale paraphernalia, is needed to suggest an intent to deliver. Hagler, 74 Wn.App. at 236 (large amount of cocaine and \$342 was sufficient to establish intent to deliver); State v. Lane, 56 Wn.App. 286, 297-98, 786 P.2d 277 (1989) (ounce of cocaine, large amount of cash, and scales); State v. Simpson, 22 Wn.App. 572, 575, 590 P.2d 1276 (Wash.App. Div. 1 1979) “Simpson argues that the evidence was not sufficient to establish the offense of possession with intent to deliver....Here the jury could have reasonably inferred "intent to deliver" from the quantity of uncut heroin found in a bottle in the bedroom, the heroin found in Simpson's pocket in a tied balloon, another balloon found on Simpson, a cut balloon found under the bed and the condition of the unusual quantity of lactose found in the oven.”

Appellant challenges the sufficiency of the evidence to support his convictions. In reviewing a challenge to the sufficiency of the evidence, this court will view the evidence in a light most favorable to the State to

determine whether any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)). A defendant claiming insufficiency admits the truth of the State's evidence and all reasonable inferences drawn in favor of the State, with circumstantial evidence and direct evidence considered equally reliable. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). The elements of a crime can be established by both direct and circumstantial evidence. State v. Brooks, 45 Wn. App. 824, 826, 727 P.2d 988 (1986). One is no less valuable than the other. There is sufficient evidence to support the conviction if a rational trier of fact could find each element of the crime proven beyond a reasonable doubt. Circumstantial evidence and direct evidence are equally reliable. State v. Dejarlais, 88 Wash. App. 297, 305, 944 P.2d 1110 (1997), *aff'd*, 136 Wash.2d 939, 969 P.2d 90 (1998).

Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "It is axiomatic in criminal trials that the prosecution bears the burden of establishing beyond a reasonable doubt the identity of the

accused as the person who committed the offense." State v. Hill, 83 Wn.2d 558, 560, 520 P.2d 618 (1974).

Regarding the charge of involving a minor there very few cases that have reviewed the issue, however State v. Flores, 164 Wn.2d 1, 186 P.3d 1038 (Wash. 2008) is dispositive of this issue. The facts set forth above when compared to those presented in Flores and State v. Hollis, 93 Wash.App. 804, 970 P.2d 813 (1999), clearly prove that Appellant's criminal culpability was proven beyond a reasonable doubt.

This is not like either Hollis or Flores where the juvenile was merely present at the scene. In the instant case you have the lead Detective testifying that when the car was initially parked at Walmart both the Appellant and the juvenile exited the car and looked around the area. The CI had to actually move their car closer to these two, Appellant then entered the CI's car, during this time the juvenile did not reenter Appellant's car. The actions of the juvenile that followed were that of a person who was conducting counter surveillance, she never left that parking lot, she did not enter the store and then when the drug transaction was completed she returned to the car that Appellant was driving. When questioned about her actions in the parking lot of Walmart the juvenile testified that Appellant had agreed to take her to Walmart to buy some feminine products, but she also testified that the

particular Walmart was 84 blocks from her home, that there was another Walmart closer to her home and that there were other stores near her home. The story told by this juvenile how had professed her love for the Appellant was not credible. The “[d]eterminations of credibility are for the fact finder and are not reviewable on appeal.” State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990). State v. Longuskie, 59 Wn. App. 838, 844, 801 P.2d 1004 (1990), “Deference must be given to the trier of fact. It is the trier of fact who resolves conflicting testimony, evaluates the credibility of witnesses and generally weighs the persuasiveness of the evidence.” (Citations omitted.)

Appellant’s car when searched had a bag from McDonald’s in the floor area on the passenger side, the drugs were delivered to the CI in a French fry container from McDonalds. It is very important to note that the original amount of money given to the CI was \$1200.00 of \$100.00 bills, one of which was returned in the McDonalds container. And last and most importantly the remainder of the \$1200.00 was removed by the juvenile from her bra when she was in the holding cell at jail. This money was confirmed to be the money given to the CI for the drug purchase.

The actions of the Appellant, having the juvenile act as a lookout, having her present in the car when obviously the drugs were

repackaged into the McDonald's box and most importantly, carrying the proceeds of the transaction inside her bra an item of personal clothing that most officer would not dare to intrude into clearly demonstrate that the Appellant was using this juvenile to facilitate his criminal actions. The Appellant had to have handed the money from this transaction to the juvenile, she after all was not present in the car when the actual transaction, the exchange of money for drugs occurred. These facts were sufficient to meet the standard

As the Court of Appeals correctly observed, the statute does not require the minor's actual participation in the drug transaction: "the minor's culpability and actions-which are proscribed under other statutes-are inapposite for the purposes of the involving a minor in a drug transaction statute. Instead, the focus is on the defendant's affirmative acts." Hollis, 93 Wash.App. at 812, 970 P.2d 813. It is not necessary to establish the minor had any criminal intent.

The court in Flores reviewed cases from federal courts were this issue had been addressed. The court stated:

Construing these similar federal provisions, federal courts hold there is no need to prove the minor participated in any way, only that the defendant committed some affirmative act to involve the minor in the commission of the offense. United States v. Paine, 407 F.3d 958 (8th Cir.2005) (defendant brought his son along for "moral support"); United States v. Curry, 902 F.2d 912 (11th Cir.1990) (defendants asked nephew to drive them across the street to consummate a drug deal), *cert. denied*, 498 U.S. 1091, 111 S.Ct. 973 (1991). "The enhancement ... focuses on whether the defendant used a minor in the commission of a crime, not whether the minor knew that he

was being used to commit a crime." United States v. Ramsey, 237 F.3d 853, 861 (7th Cir.2001).

Using this juvenile family friend to hide the proceeds from the drug deal you just completed is the very definition of an "affirmative act to involve the minor."

RESPONSE TO ISSUE THREE.

There is absolutely no factual basis to support this issue. The State has no ability to orally amend an information unless that is agreed to by a defendant. That obviously did not occur here. The information that was filed and read to the jury was what was also presented to that jury in the form of the "to convict" instructions which charged the jury with the law of the case binding the jury to return a verdict based only on that language. (CP 122, 124) Those instructions set forth all of the definitions and law for this case. (CP 111-33) The instruction are read to the jurors and they are then provided copies that are taken to the jury room. The jurors are admonished in the very first instruction that;

The lawyers' remarks, statements and arguments are intended to help you understand the evidence and apply the law. It is important, however, for you to remember that the lawyers' statements are not evidence. The evidence is the testimony and the exhibits, the law as contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions. (RP 473, CP 114)

The allegation that the State somehow amended the information in its closing argument based on the theory of the evidence that was presented during trial is without basis or merit. The State can and did base the prosecution of Appellant based on the totality of the facts presented. The information does not allege that the criminal act charged was based on the possession of one specific item or one series of events. The information alleges that these criminal acts occurred on specific dates and involved controlled substances and an individual who was a juvenile. This can be seen in the information filed against the defendant that is a portion of the record before this court as well as the to convict instruction (CP 119, 122, 126)

This alleged error was not preserved in the trial court, there was no mention by the defense during closing that there was some sort of “improper variance and/or constructive amendment of the charges.” (Appellant’s brief at 27) Appellant has not addressed how this court may consider this error, if it were to even exist, when it now being raised for the first time on appeal. Appellant “is entitled to a new trial only if his claimed errors are manifest constitutional errors. RAP 2.5(a)(3); see State v. Lynn, 67 Wash.App. 339, 345, 835 P.2d 251 (1992) (setting forth four-part manifest constitutional error test). Even if the claimed error is constitutional in nature, we will not review it unless it is also manifest.

Lynn, supra at 345. An error is manifest when the defendant shows "the asserted error had practical and identifiable consequences in the trial of the case." Id. "'[M]anifest' means unmistakable, evident or indisputable, as distinct from obscure, hidden or concealed. 'Affecting' means having an impact or impinging on, in short, to make a difference. A purely formalistic error is insufficient." Id. (footnote omitted). State v. Naillieux, 158 Wn.App. 630, 638-9, 241 P.3d 1280 (Wash.App. Div. 3 2010).

This allegation is also difficult to address in that Appellant does not support this allegation with any case law which would address "constructive amendment" of an information. The citations to the offensive portions of the state's closing argument set forth in this section of the brief. Appellant alleges this error is of such an egregious nature that this court should dismiss the entire case and yet Huetra has not and cannot demonstrate the statements made by the deputy prosecuting attorney were anything but factual, were supported by the evidence or were actually misconduct on the part of the State. Once again this is closing argument.

In addition to Appellant being unable to support his argument, none of the alleged errors are constitutional in nature. The parties are free to argue their theory of the case based on the evidence presented during trial. There was never in any change in the language of the formal

information charging the defendant with these two crimes. The State has searched Washington state case law and could only find one instance where the phrase “constructive amendment” was even used and that was in McLachlan v. Gordon, 86 Wash. 282, 150 P. 441 (Wash. 1915) a civil case regarding deceit and fraud.

At trial, "[c]ounsel are permitted latitude to argue the facts in evidence and reasonable inferences" in their closing arguments. State v. Smith, 104 Wash.2d 497, 510, 707 P.2d 1306 (1985), State v. Harvey, 34 Wash.App. 737, 739, 664 P.2d 1281 (1983) “In closing argument, counsel are given latitude to draw and express reasonable inferences from the evidence.” citing State v. Wilson, 29 Wash.App. 895, 903, 626 P.2d 998 (1981).

In State v. Besabe, 166 Wn.App. 872, 881-2, 271 P.3d 387 (Wash.App. Div. 1 2012) the state indicated midway through closing that there were changes needed to the jury instructions based on the theory of the case, this court declined to review this because the issue was not of constitutional magnitude and the alleged error was not preserved.

In the case herein, there was no actual amendment, no constructive amendment nor variance of the charges against Appellant by the State during closing argument.

RESPONSE TO ISSUE FOUR.

Appellant admits the officer could have testified about the amount of money that was given to the CI and the amount that was obtained from the juvenile after her arrest. But claims as improper hearsay, the testimony by the same officer that the numbers on this currency matched both the money that was issued and seized.

This officer was able to testify that he had the bills that he observed the bills, that he had made Xerox copies of those bills and when the bills were returned from the CI and found on the juvenile that serial numbers on those bills matched the numbers of the bills that had been issued to the detective. This is distinguishable from the cases cited, here the State was not attempting to prove the numbers just that the numbers on the bills matched a list of the numbers on the bills issued to the CI, this could have and in fact was done through the personal observations of the detective. The jury would have heard everything except the fact that the numbers matched.

Even if this court were to find error it would be harmless. The CI was searched before and after and there were no other monies on the CI at the time of that search. The officers observed the entire transaction from beginning to end and testified that no party was out of their sight from the time the bills were issued until the time the parties were arrested. The juvenile who was found to be in possession of and admitted possession,

albeit she did not know how she possessed those bills, was also under surveillance or in custody the entire time until she pulled the monies from her bra before she was searched in the jail. Clearly the jury would have been able to infer that the bills that were in the possession of the Detective at the conclusion of the case were those that were issued to the CI. The use of the serial numbers while supportive of the State's position that the bills were those issued was not essential to that proof.

Assuming for argument sake that there was error in the admission of testimony that the serial numbers matched this alleged error was nonconstitutional error and the admission of hearsay evidence requires reversal only if it is reasonably probable that the error materially affected the trial's outcome. State v. Neal, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001).

This raises the question again of the sufficiency of the evidence presented. On review, this court must view the evidence in the light most favorable to the State and determine whether it is sufficient to convince a rational trier of fact of all of the elements of the crime beyond a reasonable doubt. State v. Bower, 28 Wash.App. 704, 709, 626 P.2d 39 (1981). By challenging the sufficiency of the evidence, the defendant admits the truth of the State's evidence and all inferences reasonably drawn therefrom. State v. Theroff, 25 Wash.App. 590, 593, 608 P.2d 1254, aff'd and

remanded, 95 Wash.2d 385, 622 P.2d 1240 (1980). “‘Circumstantial evidence is no less reliable than direct evidence; specific criminal intent may be inferred from circumstances as a matter of logical probability.’” “State v. Brown, 68 Wash.App. 480, 483, 843 P.2d 1098 (1993) (quoting State v. Zamora, 63 Wash.App. 220, 223, 817 P.2d 880 (1991)).

The direct and circumstantial evidence of these crimes was overwhelming. This was a controlled buy that was observed by numerous officers using a confidential informant in a location that allowed for easy observation of what was occurring. The end result was that the CI was in possession of a substantial amount of controlled substance and was no longer in possession of all but \$100.00 of the \$1200.00 that was given to that CI. The search of the vehicle that carried the Appellant and the juvenile female to the Walmart parking lot contained additional and significant amounts of controlled substances and on top of that the “missing” \$1100.00 of currency was handed over by the juvenile female when she retrieved it from her bra. Monies which she testified she was uncertain how she came into possession of, apparently manna from heaven.

RESPONSE TO ISSUE FIVE.

This allegation is difficult to respond to because Appellant claims there are numerous instances of prosecutorial misconduct, however these

are not set forth factually in this section. Appellant refers this court to what is captioned “D. STATEMENT OF THE CASE” at page 5-13, for the specific facts to support these alleged acts of misconduct. RAP 10.3(5) sets forth the requirement for the “fact section” of a brief; “A fair statement of the facts and procedure relevant to the issues presented for review, **without argument**. Reference to the record must be included for each factual statement.” (Emphasis added.) The State has set forth below a portion of what was alleged to be the factual recitation of trial testimony in an attempt to segregate out that portion of the record upon which Appellant claims these errors occurred. As this court can see this is not a factual recitation, it is argument;

During trial, several incidences suggested improper conduct by government officials. For example, contrary to representations before trial began, the prosecutor asked the minor’s mother whether there was a romantic relationship between her daughter and Mr. Huerta. (RP 182-183) In response to a question about if the State located property of Mr. Huerta to forfeit, Detective Horbatko answered no but then gratuitously stated, “I didn’t know anything else about him and he wouldn’t talk to the police.” (RP 351) Detective Horbatko volunteered that “the confidential informant didn’t say anything about a second person arriving.” (RP 209) There were several instances of comments made by the Detective Horbatko regarding safety and other issues – sometimes in response to questions, sometimes gratuitously offered – that appeared designed to inflame the jury’s emotions rather than speak to relevant evidence. Any objections to these comments were overruled. (Emphasis added, App’s brief at 9-10)

The errors alleged in this section are that the State;

- 1) commented on defendant's post arrest right to remain silent,
- 2) presentation of impermissible hearsay,
- 3) elicitation of testimony intended to inflame the jury and,
- 4) constructive amendment of the information.

It is impossible for this court or the State to determine what specific statements were made by this detective that were "inflammatory" because the only description is that there were "several" of these and that they "appeared designed to inflame the jury" this is a standard the State is unaware of and of course without the exact language objected to there is no method for the State to address it nor for this court to determine if there is validity to this claim.

Appellant claims that the State agreed to the motions in limine, this is not supported by the record. Appellant cites to RP 96, where the following colloquy occurred between the State and the court;

MR. CAMP: Your Honor, they're fairly -- by looking at

them, many of them are --

THE COURT: Routine, yes.

MR. CAMP: Yes, the State agrees there's only one that's a little bit odd that might need some discussion, but I don't think (inaudible).

THE COURT: Is that the I love you one?

MR. CAMP: No, the State understands, one, without the confidential -- the State's not calling the girl for multiple reasons.

THE COURT: Okay.

MR. CAMP: And so, one, it would be hearsay. As to, I love you, it's not relevant unless for whatever reason the Defendant gets up and says something that, you know, I don't know this person, or something that would make it relevant and then we can discuss it at that time.

Read in context the Deputy Prosecutor is agreeing with the Court's statement that the motions are "routine" not that the State was carte blanche agreeing to each motion. Further, the State in addressing the "I love you" statement is indicating that because the State is not calling the juvenile the only means of admission would be hearsay and the State would not elicit it from a hearsay source.

Appellant called the juvenile as his own witness. The court must read the testimony of this witness, it was her presence that is the basis for count II of the information. Her testimony was at first a denial of any knowledge of basically anything, her testimony then turned into a story that was completely unsupported by the observations of the officers who were surveilling this controlled buy. Her testimony is clearly an attempt by this witness to minimize and/or deny anything occurred on that day other than the Appellant taking the juvenile to a Walmart, 84 blocks from her home, to get some sort of feminine product. (RP 441-55) The questions put to this witness were clearly done in a manner to demonstrate her bias and state of mind.

The Appellant did not object to this question and in fact elicited more discussion on this area than did the State. (RP 452-4) The only objection raised was in to the State's question regarding the response by Appellant to the juvenile's statement. This alleged error is not preserved for review. State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008);

In general, an error raised for the first time on appeal will not be reviewed. . An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "narrow" exception. A "manifest" error is an error that is "unmistakable, evident or indisputable." An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "plausible showing" "that the asserted error had practical and identifiable consequences in the trial of the case." "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." (Citations omitted.)

The State did not and was not implying that this was some sort of boyfriend girlfriend relationship. This is supported by the testimony on re-direct where Appellant's trial counsel discussed with the witness that she considered Appellant to be an uncle figure a "tio." It is further supported by the State's closing argument stating that she, the juvenile, would not be searched because she was the "...cute little 16-year-old driving with her Uncle..." (RP 504-5) Clearly the information regarding this witness's bias was relevant. She was the person who admitted on redirect examination that she was in possession of, had been given \$1100.00 which she stuffed in her bra but she did not know "why" she had

the money. The questions from the State were not some tawdry attempt to show the two people, an older man and a minor were lovers, but that they loved each other, which is a bias and a bases for witness to alter or skew her testimony in an attempt to not implicate her uncle, her “tio,” in a criminal act which could send him to prison. State v. Buss, 76 Wn. App. 780, 788, 887 P.2d 920 (1995) “The issues of credibility and the weight to be given to evidence of McWhirt's bias was for the jury to decide, not the court.”; The cross-examination of a witness to elicit facts which tend to show bias, prejudice or interest is generally a matter of right, but the scope or extent of such cross-examination is within the discretion of the trial court. “The governing principle with regard to cross-examination for the purpose of showing bias is stated in 58 Am.Jur., Witnesses, p. 386, § 715, as follows: 'It is competent, on cross-examination of a witness, to elicit facts which tend to show the bias, prejudice, or friendship of the witness for the party for whom he testifies, and to show hostility toward the party against whom he is called. State v. Robbins, 35 Wash.2d 389, 395-6, 13 P.2d 310 (1950).

The Appellant claims “the court noted that the evidence ... would not be admitted” during the colloquy between the court and Appellant’s trial counsel contained at VRP pg. 32 this is incorrect. There is no “ruling” at RP 32 there is a back and forth discussion between court and

counsel where the court is setting forth hypothetical situations, it is not ruling on admissibility of evidence as claimed by Appellant. Because there is nothing in the record to support this claimed error this court need not, cannot, address it.

The following is a portion of the “facts” set out by Appellant. The State assumes that this is the section of the “facts” that encompass the portion of the record where the alleged errors occurred;

During trial, several incidences suggested improper conduct by government officials. For example, contrary to representations before trial began, the prosecutor asked the minor’s mother whether there was a romantic relationship between her daughter and Mr. Huerta. (RP 182-183) In response to a question about if the State located property of Mr. Huerta to forfeit, Detective Horbatko answered no but then gratuitously stated, “I didn’t know anything else about him and he wouldn’t talk to the police.” (RP 351) Detective Horbatko volunteered that “the confidential informant didn’t say anything about a second person arriving.” (RP 209) There were several instances of comments made by the Detective Horbatko regarding safety and other issues – sometimes in response to questions, sometimes gratuitously offered – that appeared designed to inflame the jury’s emotions rather than speak to relevant evidence. Any objections to these comments were overruled. (App’s brief at 9-10)

Post Arrest Silence - Appellant alleges that the Detective commented on the defendant’s right to remain silent. What Appellant does not indicate is that the alleged comment occurred in response to question asked by Appellant’s trial counsel while his counsel was

directing questions to the detective on re-cross examination. This statement was in the middle of a long series of questions from trial counsel regarding the assets that were taken from defendant and what assets could be taken. There is nothing even remotely connected to any post arrest silence implicated in this exchange. (RP 349-52)

Appellant then lists what he claims are “[e]xamples of the kinds of comments included...” However the alleged errors claimed to lie within these sections of the VRP are not to be found in a full and fair reading of the portions of the VRP cited in Appellant’s brief. As was so aptly stated in State v. Smith, 68 Wn. App. 201, 207-8, 842 P.2d 494 (1992) “This court is not obligated to search the record and decide how the trial court would have evaluated that evidence, if it was present.”

The State has attempted to not respond to hyperbole and invective found throughout this brief however, “soapbox” statements such as those set forth below, unsupported by fact or law are not appropriate in an appellate brief. Similar statements were made in the “facts” section the portion of a brief that is mandated to have no argument, it is meant to be a factual road map for this court not a platform for unnecessary vitriol;

In some instances the prosecutor was complicit, as the testimony was elicited based on the prosecutor’s specific questions seeking the inflammatory and irrelevant comments. In others, the prosecutor was simply the pawn of Detective Horbatko, who likely was attempting to

bolster the case with improper asides as a way of obtaining a conviction on this weak and reversible case. Whether by prosecutorial design or witness impropriety, however, reversal is warranted due not just to the behavior itself but due to the fact of prejudice, given how shaky the evidence was already. (App's brief at 33)¹

RESPONSE TO ISSUE SIX.

Appellant has failed to supply this court with any error or errors that individually or in their aggregate would amount to or could be considered such that the cumulative effect on this trial would cause this court to overturn these convictions. There were no errors in this trial which would warrant reversal or dismissal or retrial of either of the charges. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994) "This PRP has similarly failed to demonstrate an accumulation of error of such magnitude that resentencing or retrial is necessary." Because there was no substantive error in this trial there can be no "cumulative" error. Under the cumulative error doctrine, a defendant may be entitled to a new trial when cumulative errors produce a trial that is fundamentally unfair, as stated in State v. Greiff, 141 Wn.2d 910, 10 P.3d 390 (2000);

We do not believe the cumulative error doctrine warrants reversal in this case. The application of that doctrine is limited to instances when there have been several trial errors that

¹ It is the State's understanding that Ms. Nichols, an attorney for whom the State has great respect, was not the primary or principle author of this brief.

standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial.

IV. CONCLUSION

For the reasons set forth above this court should deny the allegations set forth in this appeal and this appeal should be denied.

Respectfully submitted this 28th day of May 2015,

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DECLARATION OF SERVICE

I, David B. Trefry state that on May 28, 2015 emailed a copy, by agreement of the parties, of the Respondent's Brief, to Ms. Kristina Nichols at wa.appeals@gmail.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 28th day of May, 2015 at Spokane, Washington.

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