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DEC 23, 2013  
Court of Appeals  
Division III  
State of Washington

NO. 31543-6-III

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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

RESPONDENT,

v.

HERBERT ELMER ELLSWORTH,

APPELLANT.

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BRIEF OF RESPONDENT

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D. ANGUS LEE  
PROSECUTING ATTORNEY

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**I. IDENTITY OF RESPONDENT**

The State of Washington, represented by the Grant Count Prosecuting Attorney's Office is the Respondent herein.

**II. RELIEF REQUESTED**

Reversal is not warranted and Appellant's convictions must be affirmed.

**III. ISSUES**

1. Whether the Appellant can show prejudice by his counsel's decision not to file a motion under CrR 3.6.
2. Whether Appellant's convictions for Manufacturing Marijuana and Possession of Marijuana with Intent to Deliver constitute the same criminal conduct in law or fact.
3. Whether restitution was incorrectly imposed by the Trial Court.

**IV. STATEMENT OF THE CASE**

On the afternoon of February 4, 2012, Moses Lake Police Department (MLPD) Officer Kevin Hake responded to a report of a physical domestic in progress at 860 South Grand Drive in Moses Lake. RP 333, 334. He was the first officer to arrive, and

estimated that he did so within 60-90 seconds of having received the call from dispatch. RP 334, 336. Jackie Cooper, the mother of Monica Cooper, arrived simultaneously. RP 342. Officer Hake observed Jackie Cooper run towards the front door of the residence, and also observed Monica Cooper inside the screen door of the residence. RP 334. Although Officer Hake yelled at Jackie to stop, she instead ran into the house. RP 335.

Officer Hake went to the door of the residence and announced "Moses Lake Police Department, Monica, can I talk to you[?]" RP 335. During this time Officer Hake was able to observe that Monica Cooper was crying, moving her hands very quickly, moving all over the place, and screaming that someone had beaten her up. *Id.* Officer Hake was outside the home when Ms. Cooper initially made the statement that "he had beat her up." RP 336, 337. Officer Hake testified that Ms. Cooper's voice sounded scared and frantic. RP 336. Officer Hake then entered the home. RP 336, 337. In response to his request that she come to speak with him, Ms. Cooper responded by turning away. RP 335. Officer Hake, at the front door, then again announced "Moses Lake Police Department, Monica, I need to speak with you." *Id.* This time, Ms. Cooper headed back towards a bedroom with her mother, Jackie Cooper,

between herself and the officer. *Id.* At this point in the proceedings, Officer Hake announced a third time and then proceeded into the home. *Id.*

As he entered the home, and in an effort to gather information, Officer Hake asked Monica if “he” were still in the home, and what had happened? RP 338. Officer Hake testified that Monica Cooper was crying, speaking very quickly, moving very quickly, moving her arms all around, and acting evasive as if she were scared and wanted to get away. RP 338. She told Officer Hake that ““Herbie” had beat[en] her up and she wasn’t sure where he was at.” *Id.*

Ms. Cooper later told Officer Hake that she had been pushed into a chair and it had hurt her arm. RP 360. Officer Hake recalled Ms. Cooper showing him her arm, but did not recall observing any injuries. *Id.* Corporal Tufte testified that he had heard Ms. Cooper say that she had felt pain as a result of having been pushed twice. RP 494.

Officer Hake asked Jackie Cooper to take Monica outside and helped her to do so. RP 339. Officer Hake articulated that he was concerned about unknown threats, unknown victims, and obtaining help for the victim[s]. *Id.* Ms. Cooper had told Officer Hake that

she wasn't sure whether or not Herbie was still in the residence. *Id.* Officer Hake testified that his concern was to locate any unknown threats or persons hiding. *Id.* To that end, he walked through the house and cleared all the rooms but for one which was locked. RP 339.

Officer Hake backed into the room which he had just previously cleared and waited for Corporal Tufte, who arrived a few seconds later. RP 340. Officer Hake estimated that Corporal Tufte had arrived no more than a few minutes after his own arrival at 860 South Grand. RP 334. The officers were able to open the locked door but did not find anyone in the house. RP 340.

In the room that Officer Hake had cleared just before coming to the locked door, he was able to smell a strong odor of marijuana. RP 340, 341. And upon entering the room to clear it, was able to observe large lamps, light bulbs, and a number of plants that he immediately recognized as marijuana. *Id.*

Although he had recognized what he believed to be marijuana prior to Corporal Tufte's arrival, Officer Hake testified that his concern continued to be the possible threat behind the inaccessible door. RP 342. Officer Hake advised dispatch that he had a locked

door, was waiting for another unit, and asked for the third unit to go to the back of the residence. *Id.*

Once the residence had been cleared, he briefed Corporal Tufte who then took over as the case officer. RP 342. A search warrant was obtained and then executed. RP 343, 344, 400.

The room that Officer Hake had retreated to while awaiting additional units was referred to throughout the trial as the “purple room” or the “grow room.” RP 402. In that room, officers located a transformer or inverter which could be used to run grow lights in the closet which contained grow lights and marijuana plants. RP 403, 404. Officers also located fluorescent and infrared lights and a high intensity indoor grow light and spare bulb in the “purple room/grow room.” RP 405-409. Also located in this room was a timer attached to the main cord that went to the ballast or inverter for the grow light, as well as a white plastic container of “Monster Grow”, which indicated it was a “fertilizer blend for green vegetable growth.” RP 477, 447, 448. According to Corporal Tufte, it did not appear that anyone resided within the “purple room/grow room.” RP 413, 435. However, the officers did locate a Manila folder with tax documents for the defendant in a box in that room. RP 436,

438, 541. No documents belonging to anyone else were located in the "purple room/grow room." RP 438. Corporal Tuffe estimated that there were approximately 30 marijuana plants in this room in various stages of growing, cultivation, and drying. RP 413, 531, 541. The plants located in the "purple room/grow room" tested positive as marijuana and weighed a total of 508 grams dried including stalks and stems. RP 406, 409, 590, 592, 593, 602.

The room which had been locked was referred to throughout the trial as the "red room" or the "defendant's bedroom." In that room, officers located a dresser in the closet which had both a shelf and a whiteboard located above it. RP 438, 439, 547. On the shelf, officers located a triple beam balance scale which measured in units of grams. 438, 439, 440, 565. To the right of the scale, the officers located small sandwich bags that contained marijuana. RP 480. Also on the shelf over the dresser in the closet, the officers found a box with a self-contained marijuana sifting screen along with a jar of 21.1 grams of marijuana sitting beside it. RP 415, 417, 605, 606. Atop this same dresser was a cigar box which contained an expired concealed pistol license and debit card bearing the Appellant, Herbert Ellsworth's name. RP 462. Within the dresser, the officers found a pistol and ammunition. RP 455,

456. They also found in the same dresser six small jeweler style plastic baggies, two of which were tested and found positive for methamphetamine. 457, 459, 460, 299, 312, 326, 327.

Throughout the "red room/defendant's bedroom", the officers also found a number of plastic sandwich bags which contained marijuana in an amount of  $\geq 3.6$  grams, a metal tin with suspected marijuana scrapings, a nearly empty jar near the bed with  $< .1$  gm of marijuana, and various glass smoking devices commonly used for both marijuana and methamphetamine usage. RP 445, 448, 449, 450, 452, 453, 454, 585, 587, 588.

Corporal Tufte testified that the word "bills" and the numbers written on the white board above the dresser were, in his experience, significant in relation to the selling of drugs. RP 570

An information was filed on February 6, 2012, charging the Appellant with Manufacturing Marijuana; Possession with Intent to Manufacture/Deliver Marijuana; Possession of Methamphetamine; Assault in the Fourth Degree/Domestic Violence; and Use of Paraphernalia. CP 1. Mr. Ellsworth was found guilty as charged. RP 729, 730.

## V. ARGUMENT

### A. OFFICER HAKE'S ENTRY INTO THE ELLSWORTH RESIDENCE WAS JUSTIFIED BY THE IMMEDIACY OF THE CIRCUMSTANCES KNOWN TO HIM AT THE TIME OF HIS ENTRY.

Police may still enter a home without a warrant when there are objective grounds to believe that there is reason to fear for the safety of the occupants. Police officers responding to a domestic violence report have a duty to ensure the present and continued safety and well-being of the occupants. *State v. Lynd*, 54 Wn.App. 18, 771 P.2d 770 (1989), *State v. Raines*, 55 Wn.App. 459, 778 P.2d 538 (1989), *review denied*, 113 Wn.2d 1036 (1989), *State v. Menz*, 75 Wn.App. 351, 353, 880 P.2d 48 (1994), *State v. Johnson*, 104 Wn.App. 409, 16 P.3d 680 (2001). In *Johnson*, the Court stated that an emergency exception to the warrant requirement must satisfy three criteria:

1. The officer subjectively believed that someone likely needed assistance for health or safety reasons;
2. A reasonable person in the same situation would similarly believe that there was a need for assistance; and
3. There was a reasonable basis to associate the need for assistance with the place searched.

The Court in *Johnson* added that the officer must be able to articulate the facts and reasonable inferences which would justify the warrantless search.

Officer Hake testified that he responded to 860 South Grand within seconds of a dispatch call regarding an alleged act of domestic violence in progress. And upon arriving, had contact with a nearly hysterical victim who would not voluntarily leave the house, was hesitant to speak with the officer, and who informed Officer Hake that she was unaware of the location of the man who had beat her up.

Officer Hake voiced a concern for unknown victims who might have still been in the residence and for the whereabouts of Ms. Cooper's assailant. Officer Hake observed a good sized grow operation in plain view within a room of the residence during his process of conducting a protective sweep of the residence.

There is no indication that Officer Hake was aware of the Appellant's grow operation and drug possession before he entered Mr. Ellsworth's home. In *Lynd*, the Court noted that "[w]hether a police officer's acts in the face of a perceived emergency were objectively reasonable is a matter to be evaluated in relation to the

scene as it reasonably appeared to the officer at the time, 'not as it may seem to a scholar after the event with the benefit of leisured retrospective analysis." citing *State v. Bakke*, 44 Wn.App. 830, 723 P.2d 534 (1986). In his brief, Appellant seeks to evaluate the eleven factors articulated in *Seattle v. Altschuler*, 53 Wn.App. 317, 320, 766 P.2d 518 (1989) after the event with the benefit of "leisured retrospective analysis." However, at the time of his response, Officer Hake knew that there had been a crime of violence; that there was reasonably trustworthy information that the suspect was guilty; that there was strong reason to believe that the suspect was on the premises; that the suspect would be likely to escape if not swiftly apprehended; and that the suspect was fleeing. Officer Hake could not know whether there was danger to himself or the general public; and his entry into the residence was made peacefully.

Officer Hake responded to a scene of a reported physical domestic in progress within less than two minutes of it having been reported. He was immediately confronted with a hysterical victim who was uncooperative, along with an additional individual who gave no indication of de-escalating the situation. Officer Hake did not know the location of the alleged offender, and he did not know

whether additional potential victims remained within the home. Given Ms. Cooper's non-cooperation with his requests, Officer Hake was unable to determine the dangerousness potential without doing a protective sweep of the home. Additionally, the record indicates that Officer Hake's sweep was limited to a visual inspection of only those places where a person might be hiding. *State v. Hoskins*, 113 Wn.App. 954, 959, 55 P.3d 691 (2002).

The *Schultz* case cited by Appellant is inapposite in relation to this case. *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011). In *Schultz*, the officers made a warrantless entry into defendant's home based on no more than "raised voices." In *State v. Bean*, 89 Wn.2d 467, 472, 572 P.2d 1102 (1978), also relied upon by Appellant, officers stopped the defendant's van, located drugs, and then entered the home without a warrant with the objective to secure the scene. Neither of these cases contains the physicality component or immediacy aspect of the case now before this Court.

Under *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Appellant must establish both that his attorney's representation fell below an objective standard of reasonableness; and that there is a reasonable probability that, but

for counsel's unprofessional errors, the result of the proceedings would have been different. There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996). Appellant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). Appellant's counsel at trial, Robert Kentner, clearly considered whether or not to file a 3.6 motion in this matter, but elected instead to proceed on the defense of medical marijuana. RP 4, 5 (05/22/2012), RP 10-15 (02/21/2013). To show that he was actually prejudiced by his counsel's failure to file a motion to suppress, Appellant must show that the trial court would likely have granted the motion if made. *McFarland* at 333.

Because Officer Hake's entry into the Ellsworth home was clearly justified at the time, and his observance of the marijuana in the "purple room/grow room" was clearly in plain sight, the State would argue that Appellant cannot show that his counsel's performance was deficient or that Appellant would have prevailed had a hearing under CrR 3.6 been held.

B. APPELLANT'S CONVICTIONS FOR MANUFACTURING MARIJUANA AND POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE ARE NOT THE SAME OFFENSE AND APPELLANT'S TWO CONVICTIONS MUST STAND.

The double jeopardy clauses of the Fifth Amendment and article I, section 9, of the Washington Constitution protect defendants against multiple punishments for the same offense. The court applies the *Blockburger* "same evidence" test to determine if a defendant has been punished multiple times for violating two distinct statutory provisions. *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932). Under that test, double jeopardy is violated if a defendant is convicted of offenses that are the same in law and in fact. If each offense, as charged, includes elements not included in the other, or requires proof of a fact that the other does not, the offenses are different and multiple convictions can stand. *State v. Burns*, 114 Wn.2d 314, 788 P.2d 531 (1990), *State v. Maxfield*, 125 Wn.2d 378, 886 P.2d 123 (1994),

Here Mr. Ellsworth was charged by information in count one with "Manufacturing Marijuana" and in count two with "Possession of Marijuana with Intent to Manufacture or Deliver." Each crime

contains an element that the other does not. Not every individual who grows marijuana does so for the purpose of selling or delivering such, and not every individual who sells or delivers marijuana takes the additional step of growing it themselves. The objective intent is not the same for the two crimes committed; there was a change in the criminal objective from manufacturing to delivering. The two crimes are neither the same in law or fact, each having an element that the other does not, and each requiring proof of an element that the other does not.

At trial, the jurors heard testimony about the marijuana located in the “purple room/grow room” and the varying stages of its growth and cultivation. They also heard about the marijuana, scales, white board and baggies located in the “red room/defendant’s room.” In its closing, the State differentiated which marijuana was the basis of each of the two charges. RP 681, 682, 683. In its instructions to the jury, the Court distinguished the elements that the jury would need to find for each conviction. RP 662, 666. In addition, at Appellant’s request, the court gave a lesser included instruction of possession under 40 grams for that marijuana located within the “red room/defendant’s room.” RP 666.

As the two crimes are neither the same in law or fact, Appellant was not subjected to double jeopardy, and both convictions should remain in place.

C. APPELLANT'S ARGUMENT REGARDING  
RESTITUTION IS NOT BORNE OUT BY A REVIEW OF  
THE RECORD AND SHOULD BE STRICKEN.

Appellant was sentenced on March 26, 2013. It appears as if the restitution amount had been pre-typed into the Judgment and Sentence on page eight. CP 259. At the time of sentencing, the Court made inquiry as to whether the amount of restitution was agreed to between the parties.. RP 51 (03/26/2013). Defense counsel indicated that it was not, and the Court ruled that if restitution were being sought, the State should set a hearing. RP 52 (03/26/2013). Looking at the Judgment and Sentence as filed, it appears that the restitution figure on page eight has been clearly lined out. CP 259. Furthermore, the total imposed was only \$1,450.00 which clearly cannot include the requested restitution amount of over \$2,000. *Id.* Based upon the foregoing, it does not appear that there are any grounds for Appellant's argument regarding restitution and it should be stricken.

VI. CONCLUSION

Based upon the foregoing, the State respectfully requests this Court deny Appellant Ellsworth's appeal and affirm his convictions.

Respectfully submitted:

D ANGUS LEE  
Grant County Prosecuting Attorney

*Carole L. Highland*  
By: Carole L. Highland, WSBA #20504  
(Deputy) Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 31543-6-III
	)	
v.	)	
	)	
HERBERT ELMER ELLSWORTH,	)	DECLARATION OF MAILING
	)	
Appellant.	)	
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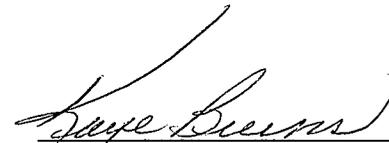
Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Dennis W. Morgan, attorney for Appellant, and to Appellant, containing a copy of the Brief of Respondent in the above-entitled matter.

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Dated: December 23, 2013.

  
\_\_\_\_\_  
Kaye Burns

Declaration of Mailing.