

35000-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

DELBERT BENSON,

Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF WALLA WALLA COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:



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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Walla Walla County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Is there sufficient evidence for the perjury conviction where two detectives testified to the search and surveillance of the criminal informant throughout the controlled buy and where the jury reviewed audio recordings of the controlled buy and the Defendant's sworn debriefing statement and a transcript of the Defendant's prior testimony?
2. Must the to-convict instruction include a non-element describing the legal sufficiency test (provided in another jury instruction)?
3. Where only one false statement is alleged to be material and to make up the charge of perjury is there any need for a Petrich instruction?

4. Did the prosecutor's closing argument, interrupted while explaining the limited conduct which the state alleged to be the crime, dilute or even address the burden of proof?

IV. STATEMENT OF THE CASE

The Defendant Delbert Benson appeals from his conviction for perjury in the first degree. CP 189, 193, 204-05.

The Controlled Buy from John Gant:

In 2012, facing charges in Columbia and Garfield counties, the Defendant approached police about working as a criminal informant (CI). RP 113-14, 136-41, 164-65, 178-79. On October 25, 2012, he entered into an agreement to make two controlled buys in Walla Walla County. RP 136-41, 163 (admitting PE 2 – CI contract), 164-65, 178-79, 274.

On October 30, 2012 at 5pm, the Defendant came to the police station where the police thoroughly searched the Defendant and his pickup truck to make sure he was not in possession of money or drugs. RP 134-35, 148-49, 265-66 (search was at 5:05 pm). Police provided him with \$200 in recorded bills and attached an audio wire to him. RP 135, 148, 157. The hour and a half audio recording of the

body wire was entered into evidence as PE 3 (RP 165-67) and has been transcribed for the appeal, referenced herein as RPE.

The Defendant then drove his truck to the home of his foster brother Wade Armour. RP 149-50, 181. Mr. Armour was waiting for him in the parking lot and climbed into the truck at 5:22 pm. RP 266, 297. They made a phone call to John Gant, left the parking lot at 5:28 pm, and drove to Mr. Gant's residence in College Place. RP 149, 266; RPE 6, 17-18.

The Defendant and Mr. Armour entered Mr. Gant's home at 5:43 pm, where they met with Mr. Gant and a female for about 40 minutes. RP 150, 266-67; RPE 17-18. Inside the residence, Mr. Gant asked the Defendant, "How much do you need? Do you want a bottle or how much to you need?" RPE 34. The Defendant said that of his \$200, he wanted to keep or "put 50 bucks on the pick-up," leaving only \$150 to spend on methamphetamine. RPE 34. *See also* RPE 8-9 (Mr. Armour telling Mr. Gant that the Defendant had \$200, but needed to reserve \$50 for gas). Mr. Gant offered to sell the Defendant "one and a half for 150." RPE 34; RP 271 ("one and half" indicated 1.5 grams of methamphetamine). The Defendant agreed.

MR. BENSON: You said one five for one?

MALE SPEAKER 1: No, one five for one five.
MR. BENSON: All right.

RPE 35.

The group exited Mr. Gant's residence at 6:23 pm. RP 266-67. The Defendant then dropped off Mr. Gant and the female at the PDQ on Main Street at 6:37 pm, and dropped off Mr. Armour back at his apartment on Wilbur at 6:51 pm. RP 151-52, 223, 267. From there, the Defendant went directly to the Walla Walla Police Department. RP 152.

The Defendant was under constant surveillance¹ throughout the controlled buy. RP 135-36, 148-49, 152, 240-41, 295-96 (three detectives in three vehicles). At the police station at 7:05 pm, police again searched the Defendant and his truck. RP 153, 267. They recovered the purchased methamphetamine and the unspent \$50, and the Defendant provided a debriefing statement sworn under penalty of perjury. RP 154, 157-58, 166 (admitting PE 4 (CD of debriefing interview)), 213. The wire recording captures Mr. Gant

¹ The Defendant states that the officers could not hear all the conversation in Mr. Gant's residence due to poor reception. BOA at 5 (citing RP 151). In fact, the record is that "transmission through the air waves isn't always as clear as the audio recording that's recorded on the SD card." RP 150-51. While the surveilling officers experienced some static over the radio, the actual recording was clear. RP 150-51, 298.

packaging the drugs in a hard, plastic, flip-cap container which bore the words "Rain Bonnet." RP 157, 159-63 (PE 7).

MR. BENSON: What comes in that? [...]
MALE SPEAKER 1: I got -- a rain bonnet came in [it].
MR. BENSON: A rain bonnet?
MALE SPEAKER 1: Yeah, for now.

RPE 36.

The Defendant never completed a second controlled buy as required under the contract. RP 274. Instead, a couple months later, he was found in possession of methamphetamine and charged with a new offense. RP 188. Having failed to satisfy the contract, he did not receive any consideration for his work as an informant. RP 187-90.

The Perjured Testimony in *State v. Gant*

The next year, the Defendant was called to testify in the case against Mr. Gant. He testified inconsistently that he was "off drugs" but also currently using drugs. RP 191, 195 (using the present perfect progressive tense indicating use was ongoing), 228 ("I'm a drug addict in prison right now").

The Defendant testified the detective had pestered him "over and over and over and over" to make the controlled buy and that the Defendant "put him off for quite some time." RP 180. In fact, the

Defendant had sought out the CI agreement himself, been “very willing” to assist police, and completed the controlled buy a mere five days after signing the contract and getting out of jail. RP 141-42, 148, 164, 180, 198.

The Defendant testified that Mr. Gant “was [the detective’s] target[,] not mine.” RP 190. In fact, the detective explained that police do not propose targets, which could incentivize criminal informants to frame innocent people. RP 141. CI’s come up with their own targets. [And the Defendant admitted that he agreed to make the controlled buys, because “I knew where to get it.” RP 190.] No target name is written into a CI contract, because an informant’s dealer is fluid and constantly evolving. RP 140, 277. The Defendant provided the targets entirely on his own. RP 137-38, 197.

The Defendant proposed obtaining drugs from Mr. Armour. RP 142. For that reason, Det. Ruchert was parked at Mr. Armour’s house shortly before the Defendant arrived. RP 269. If Mr. Armour did not have drugs at his home, the parties expected he would assist the Defendant in purchasing methamphetamine elsewhere. RP 142-43. The detective did not know that elsewhere would be Mr. Gant’s house until mid-way through the recording when Mr. Armour suggested it.

RP 197-98. Therefore, police were unable to station someone at Mr. Gant's home, but trailed the Defendant's truck there instead. RP 269, 277.

The Defendant testified that the police gave him \$150 to use to make the controlled buy. RP 181-82. In fact, they gave him \$200. RP 157, 212.

He said he drove from the police station to Mr. Armour's apartment where they got high. RP 183. In fact, he never went into Mr. Armour's house. RP 256, 296-97. Police observed Mr. Armour approach the Defendant as he sat in his truck and then get in. RP 256, 266. At the debriefing an hour and a half later, Det. Bolster did not observe behavior which would have suggested to him that the Defendant was high. RP 199-201, 220-21.

The Defendant said he got directions from "one of the girls" before driving Mr. Armour and maybe four other people to Mr. Gant's place. RP 183-84, 230. This is inconsistent with the sworn statement the Defendant made in debriefing immediately after the event. RP 211 (acknowledging only Mr. Armour accompanied him to Mr. Gant's house). It is also inconsistent with police observations that only the Defendant and Mr. Armour were in the truck on the way to Mr. Gant's

home. RP 150, 152. For the duration of the drive to Mr. Gant's home, only the voices of the Defendant and his foster brother are captured on the wire. RP 264-65; PE 3 (15:35 to 34:20). It was Mr. Armour who provided the directions, as he was on the phone and texting with Mr. Gant during the drive. RP 265; RPE 6, 17.

The Defendant testified that he did not drive Mr. Gant and his girlfriend anywhere. RP 185, 194. This conflicts with both his sworn debriefing statement and police observations. RP 151-52, 213, 223.

The Defendant testified the methamphetamine he provided to police "was mine." RP 185-86. In support of this statement, material to the prosecution of Mr. Gant, the Defendant explained that he had purchased drugs from someone else and hidden the drugs in his truck before meeting with police the first time. RP 186, 191-92.

The Defendant claimed the police had made "a very poor" search of his truck earlier in the day. RP 182. Detective Harris performed the search of the truck before and after the controlled buy. RP 292, 294, 300. It is the detective's procedure to make notes after a search to indicate anything out of the ordinary. RP 307. It took him fifteen minutes to perform the search each time. RP 301. Det. Harris testified that he would have searched the tool box if there had been

one. RP 292-94, 324.

The Defendant said, when he was leaving Mr. Gant's house, he retrieved the methamphetamine from the tool box in the back of his pickup. RP 186, 191. But police surveillance indicated there was no opportunity for the Defendant to have gone to the back of his truck to retrieve anything from the tool box. RP 152, 156.

The Defendant said the meth was inside a meth pipe. RP 192. Det. Harris had observed and recorded a meth pipe during his initial search, but it was in the center console, not the rear tool box. RP 293, 307. The Defendant told the detective the pipe belonged to Mr. Armour. *Id.* During the controlled buy, the Defendant can be heard asking Mr. Armour to take his pipe. RP 295; RPE 4 ("I know I have your pipe. I've been fucking paranoid all damn day."), 7. And when the truck was searched after the controlled buy, the pipe was no longer there. RP 294-95. The drugs police retrieved were not in any pipe, but in a hard plastic container marked "Rain Bonnet." RP 157.

The Defendant claimed that he did not give \$150 to Mr. Gant, but kept it for himself in his wallet which was in his back pocket. RP 195-96. But police searched him and his wallet; and he was not in possession of the extra \$150. RP 154, 157, 196-97.

At Mr. Gant's trial, the State had no control of the Defendant. RP 406. The defense had no need to cross examine him. RP 406. And the jury acquitted Mr. Gant. RP 302.

Perjury Trial

In 2015, the Defendant was charged with perjury. CP 4-5, 122-23. A transcript of the Defendant's testimony at Mr. Gant's trial was admitted in the perjury trial as PE 6. RP 176-77.

Again the Defendant took the stand and claimed that the methamphetamine he provided police "was mine." RP 337.

Previously, at Mr. Gant's trial, the Defendant had testified that he did not observe the search of his truck. RP 182. At the perjury trial, he changed his story, claiming that he had observed the initial search of his truck. RP 338. In fact, because the work was divided between two detectives, one detective would have been searching the Defendant's person inside the station, while another was searching the truck outside the station – such that the Defendant was not present for the truck search. RP 158-59 (Det. Harris searched the truck at "the same time that [Det. Bolster] was in the P.D. searching [the Defendant]"), 234, 259.

The Defendant testified that he and Det. Bolster were present

when Det. Harris first found and then inquired about the meth pipe. RP 338 (“he said, ‘What’s that?’ I said, ‘that’s a pipe I have to return.’”). This conflicts with Det. Harris’ testimony that the Defendant “told me **before** I went to the truck there is going to be a meth pipe in the center console [...] sure enough there was a meth pipe in the center console.” RP 293 (emphasis added). It also conflicts with Det. Bolster’s testimony that he was not present during Det. Harris’ search of the truck. RP 233-34.

The Defendant claimed Det. Harris never even tried to look in the large tool box, which was full of jacks, tools, coats, hydraulic lines, tractor parts, and a chain saw. RP 339-40. *But see* RP 292-94, 324 (Det. Harris testifying he would have searched a tool box if one were present).

Although the Defendant had previously testified the drugs were in the pipe, at the perjury trial the Defendant altered his statement, now claiming the drugs had been “rolled up in a raincoat.” RP 340. In fact, the tiny amount of product was not in a raincoat, but in a “little plastic container, kind of a flip cap” with the label “Rain Bonnet.” RP 157 (a hard container, not a plastic baggie), 221 (only 1.26 grams).

Now he claimed that as he left Mr. Gant’s house, he went to

the tool box, unlocked it, and divided the drugs “into two bunches.” RP 352. That is inconsistent with the audio recording. RP 412; PE 3

The Defendant conceded that he did not recall who had been in his truck during the controlled buy operation. RP 342. He acknowledged that he was sleep deprived and gripped by an addiction to methamphetamine. RP 344-45, 347 (“I would have melted the cup” in a drug screen), 350 (“after five days of being awake you don’t function”).

The Defendant observed Det. Bolster testify, over many failed defense objections, that a search after a controlled buy would certainly include the search of a wallet. RP 154, 157, 196-97, 202-04. He then altered his testimony and claimed, after “thinking this over I remember sticking [the \$150 buy money] in my sock,” not his wallet. RP 351. The jury considered the Defendant’s previous testimony and the taped recorded evidence of the Defendant’s purchase from Mr. Gant, and convicted him of perjury. RP 195-96; PE 3; CP189.

V. ARGUMENT

A. THERE IS SUFFICIENT EVIDENCE SUPPORTING THE CONVICTION.

The Defendant challenges the sufficiency of the evidence for

his conviction. Brief of Appellant (BOA) at 7.

First degree perjury is committed “if in any official proceeding” a person “makes a materially false statement which he knows to be false under an oath required or authorized by law.” Former RCW 9A.72.020(1) (1975). A “[m]aterially false statement” is one “which could have affected the course or outcome of the proceeding.” RCW 9A.72.010(1).

State v. Singh, 167 Wn. App. 971, 975–76, 275 P.3d 1156, 1159 (2012).

“A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom.” *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). “[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant.” *Id.* A reviewing court defers to the trier of fact on issues of conflicting testimony, witness credibility, and persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004). After viewing the evidence in the light most favorable to the State, interpreting all inferences in favor of the State and most strongly against the Defendant, the Court must determine whether any rational trier of fact could have found the essential elements beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct.

2781, 61 L.Ed.2d 560 (1979); *State v. Salinas*, 119 Wn.2d at 201.

There is a heightened proof standard for this offense. *State v. Singh*, 167 Wn. App. at 976. A swearing contest between the Defendant and a single State witness cannot sustain a conviction. The State must provide at least (1) one credible witness in a position to know the Defendant's sworn facts to be false who can provide direct testimony that is positive and directly contradictory of the Defendant's oath and (2) another witness or some other evidence that is independently corroborative. *Id.* Corroboration is required only on the knowledge of falsity element of the crime. *State v. Rutledge*, 37 Wash. 523, 527, 79 P. 1123.

Direct testimony does not require that a witness have been present at events; it is enough that the witness observed information on a recording. *State v. Singh*, 167 Wn. App. at 977 (citing *Domingo v. Boeing Employees' Credit Union*, 124 Wn.App. 71, 79–80, 98 P.3d 1222 (2004) and *United States v. Begay*, 42 F.3d 486, 502–03 (9th Cir.1994)). Witnesses may testify about information they viewed on videotape or heard on audio recording. *State v. Singh*, 167 Wn. App. at 977.

[The purposes behind the heightened proof requirements for perjury are satisfied when the evidence of the knowingly false statement is recorded prior to the hearing at which the perjury is subsequently committed. In such circumstance, the recorded evidence can both provide a basis for the witness's testimony and corroborate that testimony.

State v. Singh, 167 Wn. App. at 979.

The Defendant argues that the State was required to produce someone who was inside Mr. Gant's home at the time of the transaction, insisting that only a person who was "with Mr. Benson at the time of the alleged drug sale" can be a direct witness. BOA at 10. This is not the rule. No authority would suggest that a person who is physically inside a room but perhaps intoxicated or not paying attention is a better witness than a professional observer conducting surveillance by wire and binoculars.

A direct witness is someone "in a position to know of his or her own experience that the facts sworn by defendant are false." *Nessman v. Sumpter*, 27 Wn. App. 18, 24, 615 P.2d 522, 526 (1980). The detectives were in a position to know that the drugs were not in the Defendant's possession (on his person or in his vehicle) prior to the purchase, that the Defendant did not access the tool box during the surveillance, that the Defendant was missing \$150 on his return,

that the Defendant was in possession of drugs upon his return, that the drugs were in the packaging that Mr. Gant identified on the tape, and that the amount of drugs and price were consistent with the recorded conversation that they heard.

In a relatively recent case, this Court affirmed a perjury conviction on significantly less evidence. Jasmine Singh testified at her brother's trial that she had not talked to her brother about the facts of his case, the witnesses, or any witness' testimony. *Singh*, 167 Wn. App. at 973-74. In fact, the jail had recorded three telephone calls between Ms. Singh and her brother had in which they had discussed all of these. *Singh*, 167 Wn. App. at 973. They had discussed her need to research street gangs in order to prepare her testimony in support of defense counsel's motion to exclude gang affiliation evidence. *Id.* Her brother had instructed her to obtain a copy of discovery and to share it with another brother who was a prospective witness. *Id.* Ms. Singh was charged with perjury and convicted based on (1) the testimony of the detective who had been present during her testimony at her brother's hearing and (2) recordings of the phone calls. *Singh*, 167 Wn. App. at 974. Reviewing the heightened standard of proof, this Court found the

evidence sufficient.

In the instant case, there is much more evidence. The State offered three witnesses: the forensic scientist and two detectives who were involved in the controlled buy and searches. Both detectives were direct witnesses. The State also offered many exhibits, including:

1. Various WSP crime lab reports (RP 128, 219-20),
2. The narcotics in the "Rain Bonnet" container (RP 162-63),
3. The criminal informant contract (RP 165),
4. The CD audio recording of the controlled buy (RP 166),
5. The CD audio recording of the Defendant's sworn debriefing following the controlled buy (RP 166), and
6. A transcript of the Defendant's testimony at John Gant's trial (RP 177).

The Defendant challenges what weight the evidence should be given. He argues that his own testimony regarding the poor quality search of the truck should be considered. BOA at 11. By convicting, the jury did not find him to be credible. A court of review defers to this credibility finding. Interpreting all inferences in favor of the State and most strongly against the Defendant, it was not reasonable to believe

that the detective would have failed to open a large tool box, much less failed to search it.

The Defendant challenges the detectives' ability to see or hear. BOA at 11. Interpreting all inferences in favor of the State and most strongly against the Defendant, the detectives were able to observe what they testified they observed. The recording corroborates that the Defendant did not access the tool box with a hidden key when he brought Mr. Gant back to the truck.

The Defendant claims the transcript of the wire recording is not clear. BOA at 12-15. The transcript is not offered in a vacuum. It is illuminated by the audio exhibit, by the detectives' testimony, by the Defendant's sworn statement in debriefing, and by physical evidence which corroborates the detectives' interpretation.

The Defendant argues he cannot be convicted merely on the inconsistencies of his various statements and testimonies. BOA at 16. Nor was he. His inconsistencies did assist the jury in assessing his credibility.

The Defendant claims that he was charged with lying to police. BOA at 17. This is incorrect. He was charged with lying to the jury on June 26, 2013 when he testified that he did not purchase drugs

from Mr. Gant on October 30, 2012. CP 4, 122.

There is sufficient evidence in the direct observations of the two detectives and the multiple exhibits (including transcripts and recordings) to support the conviction.

B. THE COURT DID NOT ERR IN INSTRUCTING THE JURY.

The Defendant claims that the legal sufficiency test, i.e. Instruction No. 7 (CP 173), must not only be one of the court's instructions to the jury, but also somehow be included in the to-convict jury instructions. BOA at 18-19. An element is a fact which must be proven to sustain a conviction, generally the actus reus, mens rea, and causation. *State v. Peterson*, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). The legal sufficiency test does not provide any additional fact necessary to define and prove a crime. Because a legal sufficiency standard is not an element, but a legal sufficiency standard, its proper place is outside of the to-convict instructions, as the Washington Supreme Court has directed in the WPIC.

The superior court relied upon the to-convict instruction directed by the Washington Supreme Court in WPIC 118.02. CP 177. The Comment to the WPIC further directs a trial court to use WPIC

118.12, 118.16, 118.17, and 10.02. These were employed. CP 173-76, 185.

The Defendant argues that Instruction 5 (regarding the equivalent weight of direct and circumstantial evidence) contradicts Instruction 7 (the requirement of a direct witness), and that the remedy is to force the legal standard into the to-convict instruction. BOA at 22. There is no contradiction in the instructions. One speaks to weight; the other to a legal sufficiency requirement for at least one direct witness.

The Defendant claims that the to-convict instruction should have contained the “to wit” language in the information. BOA at 24. He argues that, absent this specificity, the jury could convict on different conduct, because the Defendant made so many small, false statements at Mr. Gant’s trial. The premise is error. The jury was only presented with one act alleged to be the crime. There is no requirement for such an instruction when only one act is alleged. *State v. Hanson*, 59 Wn. App. 651, 656-57, 800 P.2d 1124, 1129 (1990)(if the evidence proves only one violation, then no *Petrich* instruction is required for a general verdict will necessarily reflect unanimous agreement that the one violation occurred).

Here, while the State's evidence showed that the Defendant was incorrect on many details, the State only alleged and demonstrated that a single point was knowingly and materially false. Both attorneys made abundantly clear in their arguments what conduct was at issue.

In the opening statement, the prosecutor described a single false statement, concluding this way:

And when you have heard everything and deliberating about this case you are left with two choices: Did he lie on the stand regarding whose drugs this was, or was it really his?

RP 117.

The prosecutor's closing argument was similarly concise, explaining that the statement at issue was the Defendant's claim "that the dope was his." RP 379. "[E]ssentially nuts and bolts he denied that he got anything from Mr. Gant, that it was his dope [...] it wasn't Mr. Gant's." RP 381-82.

Defense counsel went further and clarified what falsehoods were *not* before the jury.

[T]he State of Washington is not charging Delbert Benson with perjury because he said how many people were in a vehicle or weren't in a vehicle. That's not at issue. That's not material. So even if he was wrong

about the number of people in the vehicle, there or back, that has nothing to do with anything.

....

But that's not a material issue because the issue isn't how many people were in his car ... So their indication of Delbert Benson committing perjury is that he lied to you, ladies and gentlemen, about receiving a controlled substance.

....

... just to make sure you understand what the State is not accusing Mr. Benson of. In addition to not accusing him of committing perjury because of the number of people that happened to be in a truck or not in a truck, they are also not accusing him of making a false statement in an official proceeding when it came to giving the statement to Detective Sergeant Gary Bolster when he was at the police station. ... they didn't charge him with that. And they're not attempting to accuse him of Perjury because he lied to Detective Bolster at the police station.

RP 387-89. Defense counsel concluded:

Please, ladies and gentlemen, when you go into the jury room [listen to the tape]. ... You are going to hear a voice that is not Delbert Benson's saying, I can't help you out. That squares with Mr. Benson's testimony that there was no delivery of a drug.

RP 402.

And in rebuttal, the prosecutor explained that the utility of those other discrepancies was limited to determining credibility.

[A]s counsel for Mr. Benson told you, Mr. Benson is not on trial for having lied about maybe who was in the vehicle or who wasn't in the vehicle, or [] anything said about prices or amounts or anything like that. But those

are important pieces to this puzzle, because they tell you, well, you know, if he is fudging about that, and he is fudging about that and he can't tell the truth about that, well, then what about the big things?

RP 409.

There can be no suggestion on this record that the jury could be confused about the conduct they were considering.

C. THE PROSECUTOR'S CLARIFICATION OF THE CONDUCT BEFORE THE JURY FOR ITS CONSIDERATION DID NOT ADDRESS, MUCH LESS DILUTE, THE BURDEN OF PROOF.

The Defendant complains that the prosecutor's argument, which pointed out that the question before the jury was singular, a single false statement, somehow diluted the burden of proof or trivialized the trial. BOA at 26. The claim misrepresents the record. The prosecutor's argument was entirely proper and in no way touched upon the burden of proof.

As the prosecutor wound up his closing comments, defense counsel interrupted the prosecutor's flow and impact with an objection. RP 413. The objection misstated the prosecutor's argument. The judge interrupted the objection and quickly overruled it. RP 413. However, the defense obtained the desired result, which was to confuse the jury about the prosecutor's point and to disrupt the

prosecutor's train of thought.

MR. ACOSTA: ... people like analogies. It's always kind of difficult to come up with one that makes some sense. If this were a trial about whether or not a boat existed, was made, and the plaintiff was alleging this is a boat, this would be a case where the defense is telling you, well, we're not sure because we don't know if it has one mast or two masts, maybe even three masts, when all you have to decide is, is it a boat, and will it float? And the State submits to you that you know, after you have, now that you have heard everything –

MR. McCOOL: Your Honor, I apologize. I have to object. I think counsel is trivializing the term –

THE COURT: Overrule. Again, ladies and gentlemen, what the lawyers say isn't evidence. It's not law. You will get the evidence from what you heard and get the law from my instructions. Go ahead. This is argument.

MR. ACOSTA: After you have seen, gone through the evidence, the transcript, the wires, that you are left with no reasonable doubt but that Mr. Benson committed the crime of Perjury back in June of 2013. Thank you.

RP 413.

The Defendant continues to misrepresent what the prosecutor was attempting to say. The prosecutor was not discussing the burden of proof at all.

While there were many details to puzzle through, the prosecutor did not want the jury to be confused about the essential

facts (or conduct) for their consideration. RP 409. It was not essential that the jury decide whether the Defendant was telling the truth when he said he was off drugs at Mr. Gant's trial versus when he said he would have melted the cup in his own trial. RP 406-07. It was not crucial that the jury figure out why the methamphetamine that Mr. Gant represented to be 1.5 grams weighed slightly short at the state lab. RP 407. While it was interesting to consider what changed the night before Mr. Gant's trial to alter the Defendant's testimony, that also was not the issue. RP 408. It was not important who rode in the Defendant's vehicle on October 30, 2012. RP 409.

The prosecutor had been making the point to the jury that there was a single issue for their consideration: did the Defendant lie when he said the dope was his?

On the one hand, the Defendant complains that the conduct which made up the false statement was not clear. And then on the other hand, the Defendant complains when the prosecutor was making this clear. The prosecutor committed no error and made no comment on the burden of proof by making clear the conduct for the jury's consideration.

VI. CONCLUSION

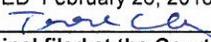
Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: February 26, 2018.

Respectfully submitted:



Teresa Chen, WSBA#31762
Deputy Prosecuting Attorney

<p>Nancy P. Collins nancy@washapp.org</p>	<p>A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED February 26, 2018, Pasco, WA  Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201</p>
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February 26, 2018 - 3:42 PM

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