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DIVISION III
STATE OF WASHINGTON
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NO. 35668-0-III

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

GREGG A. LOUGHBOM
Defendant/Appellant

APPEAL FROM THE SUPERIOR COURT OF
LINCOLN COUNTY, STATE OF WASHINGTON
HONORABLE JOHN STROHMAIER

BRIEF OF RESPONDENT

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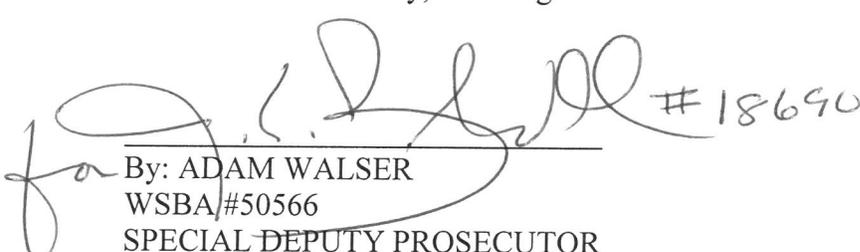
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DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

v.

GREGG A. LOUGHBOM,

Defendant/Appellant.

Court of Appeals # 35668-0-III
Lincoln County # 17-1-00028-8
RESPONDENT'S BRIEF

COMES NOW, the Respondent, State of Washington, by and through Adam Walser, Special Deputy Prosecuting Attorney for Lincoln County, and respectfully submits this brief.

I. STATEMENT OF THE FACTS

Defendant was charged by the Lincoln County Prosecutor, on May 18, 2017, with the following three offenses: Count I: Delivery of a Controlled Substance, to wit Acetaminophen and Hydrocodone; Count II: Delivery of a Controlled Substance, to wit Methamphetamine; Count III: Conspiracy to Deliver a Controlled Substance, to wit Methamphetamine,

Acetaminophen, and Hydrocodone. CP 1-2. On 17 October, 2017, the Court granted a State's motion to amend the charges of 18 May, 2017, to include a School Zone Enhancement under RCW 69.50.435. Verbatim Report of Proceedings 8-9 (Hereinafter "VRP").

Onn 18 October, 2017, the matter was tried before a Jury in the Superior Court of Lincoln County Washington. VRP 21. While conducting voir dire of the jury, the Prosecution's final line of inquiry primarily focused on at whether any prospective juror had a bias regarding drug decriminalization policy within Washington State. VRP 52-56. In beginning this inquiry, the Prosecution asked the jury "whether any among you believe that we have a drug problem in Lincoln County?" VRP 53. This question represented the entirety of the Prosecution's reference to any "drug problem" during voir dire and no objection was made by the Defense. VRP 53. The Prosecution followed this statement with an extended period of questioning testing the jury pool's opinions toward decriminalization of specific drugs, decriminalization of drugs in general, and the presence of drugs near school zones. VRP 53-56.

During his opening statement, the Prosecution described the subject matter at issue as "another battle in the ongoing war on drugs

throughout our state and throughout our nation as a whole.” VRP 87. This was the sole reference to the “War on Drugs” during the Prosecution’s opening statement. VRP 87-89. No objection was made to this statement. VRP 87.

During direct examination of Detective Roland Singer, the Prosecution asked the witness “How do you usually recruit confidential informants?” VRP 103. In response, Detective Singer discussed several means by which law enforcement enlist the services of a confidential informant; these included persons seeking to mitigate criminal charges against them as well as persons volunteering to assist law enforcement out of an interest in combatting “the drug problem” that exists in their community. VRP 103. No objection was made to this response by Detective Singer. VRP 103.

Near the conclusion of the direct examination of Detective Singer, the Prosecution asked “is there any information that you would consider relevant that I have failed to address, here?” Detective Singer responded that, during the first controlled buy involving the Defendant his confidential informant had been informed that “he had someone coming in that day that would bring methamphetamine.” VRP 117. This testimony

was objected to by the Defense Counsel on the basis of hearsay. VRP 117. The Defense objection was sustained and the jury instructed to disregard Detective Singer's statement. VRP 117. Detective Singer, without further questioning by the Prosecutor, continued his testimony as follows:

“At that time it was identified that the vehicle, a red pickup, with a black hood, and what was associated with that person. . . . [T]hat vehicle was seen at the residence when we did the controlled buy. We also got the registration off of it after the controlled buy, which returned to the defendant – as the registered owner.” VRP 117. There was no Defense objection to this testimony by Detective Singer. VRP 117.

The next witness called by the Prosecution was Lincoln County Sheriff Sergeant, Mike Stauffer. VRP 146. During his testimony Sergeant Stauffer testified that he observed the Defendant at the same residence where the second controlled buy had allegedly taken place, the day following that controlled buy. VRP 159. Sergeant Stauffer went on to state that he observed the Defendant exit the residence and get inside the same red truck Detective Singer had previously identified as belonging to the Defendant. VRP 160. During the Defense cross examination of Sergeant Stauffer, the Defense counsel solicited that he had seen that same red truck

parked at the residence where the first controlled buy took place, on the date of that controlled buy. VRP 161. He also testified on Defense cross examination, that this truck was registered to the Defendant. VRP 161.

A failure of the recording equipment used at Defendant's trial resulted in 103 minutes of trial audio failing to be recorded. VRP 167. The portion of trial which was not recorded included the latter half of the Prosecution's direct examination of Jayne Elizabeth Wilhelm, a Supervising Forensic Scientist for the Washington State Patrol Crime Laboratory, the Prosecution's entire closing argument and a significant portion of the Defense Counsel's closing argument. VRP 167. A Narrative Report of Proceedings (hereinafter "NRP") was constructed, which included a summary of the State's closing argument. NRP 183-185. No similar summary was made of the missing portions of Defense Counsel's closing argument.

The Prosecution's closing argument, according to the NRP, began with the statement "The case before you represented another battle in the ongoing war on drugs throughout our state and the nation as a whole." NRP 183. The NRP indicates that there was no Defense objection made to the Prosecution's argument. NRP 183-185.

In rebuttal, the Prosecution stated that “law enforcement cannot simply pick and choose their CIs to be the golden children of our society to go through and try and complete these transactions as they go forward in the, like I said, the ongoing war on drugs in this community and across the nation.” VRP 168. Additionally, the Prosecution included the following statement in the rebuttal argument:

“[F]inally, Gregg Loughbom didn’t deny anything. Ms. Iverson had stated that Gregg Loughbom denied being any part of this or denied being at these locations. That’s not true. Gregg Loughbom didn’t deny anything. He didn’t testify and there was no evidence that he ever denied -- no evidence presented that he ever denied anything.

Now, I’m not suggesting that you can use his silence against him. Of course not. There’s an instruction against that. I’m merely suggesting that at no time did Gregg Loughbom ever deny that as she has presented in her arguments.” VRP 170

The precise arguments made by Defense Counsel in their closing

argument, which the Prosecution was rebutting were not recorded, due to the audio malfunction. VRP 167 Additionally, no reconstruction of the missing portions of the Defense Counsel's closing argument was created in the narrative report of proceedings. NRP 183-185. No objection was made to the Prosecution's reference to either the war on drugs, or the Prosecutions rebuttal of Defendant's alleged denial. VRP 168, 170 & NRP 183.

II. ARGUMENT.

A. THE STATEMENTS OF THE PROSECUTION WERE PROPER AND DID NOT PREJUDICE THE DEFENDANT'S TRIAL

“A defendant who alleges improper conduct on the part of a prosecutor must first establish the prosecutor's improper conduct and, second, its prejudicial effect.” *State v. Dhaliwal*, 150 Wn. App. 559, 578. (2005). If an appellant is able to establish that the prosecutor's conduct was improper, “prejudice is established only if there is a substantial likelihood the instances of misconduct affected the jury's verdict.” *State v. Pirtle*, 127 Wn.2d 628 (citing *State v. Evans*, 96 Wn.2d 1, 5, 633 P.2d 83

(1981)).

“When alleged error can be obviated by asking the court to give a corrective instruction or admonition, the defendant has a duty to make that request.” *State v. Crawford*, 21 Wn. App. 146, 152-153(1978) (Citing *State v. Brown*, 74 Wn.2d 799, 447 P.2d 82 (1968); *State v. Green*, 70 Wn.2d 955 (1967); *State v. Webster*, 20 Wn. App. 128 (1978)). “Unless prosecutorial conduct is flagrant and ill intentioned, and the prejudice resulting therefrom so marked and enduring that corrective instructions or admonitions could not neutralize its effect, any objection to such conduct is waived by failure to make an adequate timely objection and request a curative instruction.” *State v. Charlton*, 90 Wn.2d 657, 661 (1978) (Citing *State v. Morris*, 70 Wn.2d 27, 33 (1966); *State v. Huson*, 73 Wn.2d 660 (1968); *State v. Music*, 79 Wn.2d 699, 489 P.2d 159 (1971)).

The Washington State Supreme Court has held that a prosecutor’s comments should be reviewed “in the context of the total argument, the issues in the case, the evidence addressed in the argument, and the jury instructions.” *State v. Ziegler*, 114 Wn.2d 533, 540 (1990). The burden of establishing that the comments were improper is upon Appellant. *State v. Watkins*, 53 Wn. App. 264, 275 (1989).

1. The Prosecution's Statement's Referencing the "War on Drugs" Were Neither Flagrant nor Ill Intentioned, but Only Contextual

Appellant cites four instances throughout the trial in which the Prosecutor, or a witness, made a remark referencing the war on drugs. During trial, the Defense Counsel did not object to any of the four remarks, and thus the Appellant must establish that the remarks were both flagrant and ill-intentioned. *State v. Charlton*, 90 Wn.2d at 661. Additionally, the remarks must be so extreme that no corrective admonition or instruction would have been able to cure the error. The Appellant's brief fails to establish that the remarks were flagrant and ill intentioned, or that they were sufficiently prejudicial to merit reversal. Even had counsel objected at trial, Appellant would still be unable to show that the prosecutor's remarks were even improper, or that they were unfairly prejudicial.

Remarks During Voir Dire

The transcript of the State's Voir Dire of the jury encapsulated sixteen pages of the Verbatim Record of Proceedings. During this period, the Prosecutor delved into a litany of subjects, the overwhelming majority

of which had nothing to do with drugs. It was not until the State was three quarters of the way through voir dire that the Prosecutor touched on the subject of drugs for the first time. Immediately prior to beginning the discussion of drugs and drug policy, the Prosecutor was engaged in an extended discussion with the jury regarding the distinctions between direct and circumstantial evidence. Immediately after leaving that subject matter, the Prosecutor asked the following question:

Now, kind of getting into a little bit about the nature of this case, this, as mentioned, Judge Strohmaier stated this involves two counts of Delivery of a Controlled Substance and one count of Conspiracy to Deliver a Controlled substance. Are there any among you who believe that we have a drug problem in Lincoln County? Wow, okay. Just about everything.

Is there anyone who feels that we don't? Just so I can eliminate the –

Anyone else who thinks we don't have a problem in the area or -- or don't have one? Okay.

Immediately following this, the Prosecutor ceased all remarks regarding the “war on drugs” and began probing the jury’s opinions on specific drugs and drug policies.

The context, in which the Prosecutor’s remarks took place, indicates that they were meant as a transition from the subject of evidentiary nuance to the subject of drugs and drug policy. As such, they were plainly not intended to inflame the passions of the jury, but only to “book-end” one subject and begin another.

A more nuanced and cautious method of transition between subjects may be advisable; however, Appellant’s burden requires that the Prosecutor’s statement be flagrant, ill intentioned and so prejudicial that a judicial instruction would have been unable to cure the prejudice. Appellant has not met that burden.

Remarks During Opening Statement and Final Summation

As with voir dire, the remarks made during the State’s opening statement and closing argument were a means of establishing the context for the subject matter being discussed at the time. The Defendant’s whole trial surrounded the subject of drugs, drug possession, drug distribution and the means of combatting them. Each of these subjects is almost

inescapably linked to a greater context of drug enforcement, which is also referred to as the “war on drugs.” It was in this light, that the Prosecutor described Appellant’s trial as a “battle in the ongoing war on drugs.”

Regrettably, the State’s closing argument not recorded. All that is provided for review is a narrative summary of that argument. This narrative appears to be an extreme generalization of the actual argument. As such, there is no clear means of determining either the context in which the alleged statement was made or the accuracy of how it was actually presented. What is clear, even from the narrative, is that the Prosecutor’s remarks were not an attempt to inflame the passions of the jury, nor could they reasonably be interpreted as having that effect. Instead, when viewed through the entire context of the trial, the prosecutor was simply establishing a context and “flow” to his statements and arguments.

Remarks of Detective Singer

Finally, the remark by Detective Singer, was uttered only to in order to provide a complete answer to the question posed to him by the State. Detective Singer was asked by the Prosecutor how he recruited confidential informants, an entirely fair question in light of the evidence presented at trial. This question required Detective Singer to explain

common motivations for why an individual would voluntarily act as a confidential informant, this would include individuals motivated by a desire to combat the distribution of drugs within their community. There was nothing prejudicial about the question posed to Detective Singer by the Prosecutor, or in the manner Detective Singer responded. When discussing the potential motivations that may inspire a member of a community to assist law enforcement in combatting drugs, it would be difficult to do so without discussing the existence of drugs within that same community. When viewed within context of the matter being inquired into by the State, Detective Singer's comments were neither flagrant, ill intentioned nor irreparably prejudicial to the Defendant.

Conclusion

Appellant's brief effectively asks the court to declare any reference to the war on drugs "magic words." The mere utterance of these "magic words" would trigger a reversal. However, the case law cited by Appellant makes it clear that the specific combination of the words "war on drugs" are not "magic words." Instead, it is the manner in which those words are used and intended which is important.

A careful reading of the cases cited by Appellant, reveals a

common theme in which the jury is asked to substitute their emotion for the evidence. In those instances, the jury was told to “send a message” to drug dealers, to “stand as a bulwark against ... this poison”, that they have a “duty to do something about the drugs traffic in our community” or otherwise utilize innuendo in order to achieve a verdict based on emotion, rather than judgment. See *United States v. Beasley*, 2 F.3d 1551(11th Cir. 1993); *United States v. Johnson*, .968 F.2d 768 (8th Cir. 1992); *United States v. Barlin*, 686 F.2d 81 (2d Cir. 1982); *United States v. Hawkins*, 193 U.S. App. D.C. 366 (D.C. Cir 1978). The allegedly improper comments of the Prosecutor, even when viewed in conjunction with one another, are comparatively benign, and none involve such innuendo or appeals to the jury’s emotion.

The mere utterance of the words “war on drugs” does not magically create prejudice. Prejudice springs from the context in which those words are used and the effect they are intended to have. In this case, the Prosecution was simply giving context and orienting the jury to a given subject matter. This is not to say that the complained of remarks were a wise means of establishing context. However, despite being less than cautious, the Appellant has not established that the Prosecutor’s

statements were flagrant, ill intentioned, improper, or unfairly prejudicial. Consequently, Appellant's request to overturn on this basis should be denied.

2. The Prosecutor's Remarks Rebutting the Specific Claims made by Defense Counsel

An accused's right to remain silent is enshrined under the United States Constitution, which states that no person "shall . . . be compelled in any criminal case to be a witness against himself", and within the Washington State Constitution, which states "no person shall be compelled in any criminal case to give evidence against himself." U.S. Const. Am. 5; Wash. Const. Art I § 9. The two constitutional provisions should be interpreted equally and construed liberally. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *State v. Easter*, 130 Wn.2d 228, 236 (1996). The intent of these provisions is "to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt." *State v. Easter*, 130 Wn.2d at 236.

When analyzing whether such a remark merits reversal, the court must determine if "the prosecutor manifestly intended the remarks to be a

comment on that right” and whether the remark would “‘naturally and necessarily’ emphasize defendant’s testimonial silence.” *State v. Crane*, 116 Wn.2d 315 (1991) (citing *State v. Scott*, 93 Wn.2d 7, 13(1980); *State v. Crawford*, 21 Wn. App. 146, 152 (1978)). The remarks should “be viewed in light of the surrounding circumstances.” *State v. Scott*, 93 Wn.2d 7, 13 (1991).

The Prosecutor’s Remarks Were not “Comments” on Appellant’s Right to Remain Silent

Even under a liberal interpretation, the right against self incrimination is not absolute. “A mere reference to silence which is not a ‘comment’ on the silence is not reversible error absent a showing of prejudice.” *State v. Lewis*, 130 Wn.2d 700, 706 (1996) (Citing *Tortolito v. State*, 901 P.2d 387, 390 (Wyo.1995)) A “comment” on the silence of a Defendant “occurs when used to the State’s advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.” *Id.* In instances where a defendant’s silence is referenced by the State, his conviction will be upheld unless the defendant can “show that he was prejudiced by the statements.” *State v. Henderson*, 100 Wn. App. 794, 799 (2000) (Citing *State v. Sweet*, 138 Wn.2d 466, 481 (1999)).

Under the standard put forth in Lewis, the Prosecutor's statement was not a "comment" on the Defendant's silence, as it was not put forth "as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." Lewis, at 706. It was instead put forth in order to rebut the assertions made by his counsel and attributed to the Defendant. In order to prevent any inference of guilt based on the Defendant's silence, the Prosecutor immediately followed his remarks by admonished the jury against drawing any negative inference from it. Additionally, the Prosecutor reminded them of the judge's instructions on this matter. Specifically, he stated the following:

"I'm not suggesting that you can use his silence against him. Of course not. There's an instruction against that. I'm merely suggesting that at no time did Gregg Loughbom ever deny that as she has presented in her arguments."

The Prosecutor was plainly not attempting to suggest the Defendant's failure to testify was "evidence of guilt" or "an admission of guilt." Instead, he was simply rebutting the false claims of the Defense Counsel. Consequently, the references made by the Prosecutor should not

be construed as a “comment” on the accused’s silence.

Should the Court determine that those remarks were a comment on Appellant’s silence at trial, any prejudice caused was cleansed by the admonition of the Prosecutor and the Judge’s instructions

Even in those instances where the remarks of a prosecutor inhere prejudice, such prejudice may be “removed when the trial court admonish[es] the jury to disregard counsel's legal argument...” State v. Bennett, 20 Wn. App. 783, 787 (1978). In this instance, the court provided just such an admonishment in their instructions. Additionally, the prosecutor himself cautioned the jury against drawing any negative inferences from the Defendant’s silence. Any prejudice that may have been cause by the Prosecutor’s statements is slight, and was cleansed by both the instructions of the court as well as the Prosecutor’s admonishment.

The Prosecutor’s Remarks Were a Rebuttal Defense Counsel’s Claims

The Supreme Court has held admission of a defendant’s prior testimony (or lack thereof), which would otherwise be barred by the 5th Amendment, may be admitted based on the defendant’s action. In Harris v. New York, the Supreme Court held that statements otherwise barred by

the 5th amendment may be admitted in order to rebut a defendant's testimony at trial that was given perjurally. 401 U.S. 222 (1971). An accused who elects to testify, but does not necessarily testify in a manner which constitutes perjury, may still be impeached with their post-arrest silence, which would otherwise be inadmissible. (See *Fletcher v. Weir*, 455 U.S. 603, 607 (1982)). Additionally, a defendant who testifies at a subsequent trial, may be impeached based upon the fact that he failed to testify at a previous trial on the same charges. (See *Raffel v. United States*, 271 U.S. 494, 497 (1926) (See also *Jenkins v. Anderson*, 447 U.S. 231, 236-237 (1980)).

Appellant claims that the Prosecutor impermissibly commented on his right to remain silent, during the State's rebuttal argument. However, the Prosecutor's remarks were not intended as a comment on Appellant's silence, but as a rebuttal of assertions made by Defense Counsel during closing argument.

The failure of the recording equipment used at trial has unfortunately prevented any creation of a verbatim record of Defense Counsel's closing argument. However, the record of the State's rebuttal provides ample context for the argument which the Prosecutor was

rebutting. Within that rebuttal, the Prosecutor stated the following:

“And, finally, Gregg Loughbom didn’t deny anything. Ms. Iverson had stated that Gregg Loughbom denied being any part of this or denied being at these locations. That’s not true. Gregg Loughbom didn’t deny anything. He didn’t testify and there was no evidence that he ever denied -- no evidence presented that he ever denied anything.”

This rebuttal by the Prosecutor makes it clear that Defense Counsel, in her closing argument, claimed the Defendant had expressly denied being any part of the charged misconduct or that he was at the locations in which the charged acts took place. As the Defendant did not testify at trial, any assertion that he had expressly denied certain facts could not possibly be true. The Prosecution’s reference was not intended as a comment on Appellant’s failure to testify, but was meant to rebut specific claims made by Defense Counsel. The context in which the Prosecutor’s remarks were made, was invited by the Defense Counsel.

In the present circumstance, the assertion that the Defendant expressly denied specific facts could hardly be rebutted without pointing to the fact that the Defendant did not testify. That this issue was placed

before the jurors, was a golem of the Defense Counsel's creation. If a defendant were to make these same claims during testimony, surely the state would be permitted to rebut those claims, even if doing so meant utilizing evidence that would otherwise violate the 5th amendment. The Appellant's position would allow a defendant to accomplish the same goal, but in a manner that prevented the State's ability to rebut; thereby using the right against self incrimination as both a sword and a shield. A defense counsel whose client did not testify could attribute any claim they wished to that client. The state would then be forced to choose between remaining entirely silent on these claims or risk a reversal by pointing out that the defendant had never made that claim. This amounts to a classic example of "heads I win, tails you lose."

While the right to remain silent should be construed liberally, it is not endless. If a defendant testifies falsely, that testimony can be rebutted using evidence that may otherwise be barred. These same principles apply when those claims do not come from the defendant directly, but are instead made for him, through counsel. The remarks of the Prosecutor were invited by the claims put forth by Defense Counsel, and are not grounds for reversal.

3. Claim of Ineffective Assistance of Counsel

The right to effective assistance of counsel in criminal proceedings is guaranteed to a defendant by the sixth amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. US Const Art VI; Wash St. Const. Art I § 22. In order to show ineffective assistance of counsel, an appellant must show:

"(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different."

In re Pers. Restraint of Davis, 152 Wn.2d 647, 672-673 (2004) (Citing *State v. McFarland*, 127 Wn.2d 322, 334-35 (1995)). An appellant's "failure to establish either element of the test defeats the ineffective assistance of counsel claim." *Strickland v Washington*, 466 U.S. 668, 700 (1984).

In order to prevent "the distorting effects of hindsight" the

Supreme Court has directed that ineffective assistance of counsel claims be approached “with a strong presumption that counsel's representation was effective.” *Id* at 673 & 689. Because of this presumption “the burden rests on the accused to demonstrate a constitutional violation.” *United States v. Cronie*, 466 U.S. 648, 658 (1984). In order to rebut this presumption, an appellant must prove that the assistance received by counsel was “unreasonable under prevailing professional norms and that the challenged action was not sound strategy.” *In re Pers. Restraint of Davis*, 152 Wn.2d at 673. Any assertion of unreasonableness on a counsel’s part must be “evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances.” *Id.*

Defense Counsel’s Failure to Object to the Remarks of the Prosecutor

As outlined above, the remarks of the Prosecutor relating to the war on drugs were neither improper nor prejudicial. The remarks were little more than a rephrasing of the commonly known fact that law enforcement combats drug distribution. Given that Appellant’s trial centered entirely around drug distribution, as well as law enforcement’s attempts to combat it, this concept was inescapably interwoven with Appellant’s trial. Consequently, the mere mention of this concept does not

constitute an improper act by the Prosecutor. As such, the Defense Counsel's failure to object was entirely reasonable and an objection would have been overruled.

The Prosecutor's remarks made in rebuttal were similarly not objectionable. As explained above, the Defense Counsel had invited and opened the door to these claims. However, even if they were objectionable, they were of a de minimis nature and instructions by both the judge and Prosecutor cleansed them of any prejudicial affect.

Had Defense Counsel objected, there is no reason to believe the outcome of the trial would have been different. While Appellant's brief characterizes the State's evidence as "exceedingly thin", nothing could be further from the truth. The State's primary witness was a confidential informant. This witness testified to purchasing controlled substances from Appellant directly. Detective Singer testified that he thoroughly searched the defendant prior to the purchase, that no drugs were present, that he observed the confidential informant enter the location where the purchase took place and that the confidential informant returned with drugs in his possession. During one of these purchases, law enforcement observed a vehicle owned by the Defendant, at the time and location where the

purchase took place, which the Defendant was later seen driving, on several occasions.

Appellant's brief advances several theories to explain away the evidence against him, including that his wife may have been driving the vehicle and that someone else provided the confidential informant with the controlled substances. The common thread among all of these theories is that none were supported by the evidence at trial and thus all amount to pure conjecture.

The complained of remarks by the Prosecutor were not improper, as the evidence was more than sufficient to sustain a conviction. and thus did not merit objection. Should the court find these remarks were improper, the potential prejudice was exceedingly slight and the evidence of guilt was sufficient to ensure that these remarks were not outcome determinative. Therefore, the Appellant's request for reversal should be denied.

Defense Counsel's Failure to Move for a Mistrial Was Not Ineffective

Assistance of Counsel

Appellant's brief has appropriately stated the case law controlling

an appellant's claim that failure to move for a mistrial. App Br. 28-29.

Appellant asserts that the failure of Defense Counsel to move for a mistrial made assistance of counsel ineffective. The complained of remarks came during the State's direct examination of Detective Singer. During Appellant's trial, Detective Singer testified that he had been told, by a confidential informant "he had someone coming in that day that would bring methamphetamine." The confidential informant had apparently been told this by another party. An objection to this testimony on the basis of hearsay was sustained and the jury was instructed to disregard Detective Singer's comments. Immediately following the objection, Detective Singer stated the following:

"At that time it was identified that the vehicle, a red pickup, with a black hood, and what was associated with that person. And that vehicle was seen at the residence when we did the controlled buy. We also got the registration off of it after the controlled buy, which returned to the defendant ... as the registered owner."

This testimony by Detective Singer was not objected to by the Defense Counsel a second time.

This testimony relayed facts that were known by Detective Singer from his own observations, not on the basis of hearsay, it was thus not objectionable. Detective Singer first testified that the Defendant's vehicle was seen at the residence when the controlled buy took place. This was a personal observation of Detective Singer. He then testified that he had reviewed the registration of the vehicle, which indicated that it was owned by the Defendant. Again, this was information known personally by Detective Singer, not provided to him by the confidential informant. Thus, there was no basis to object to this testimony. This testimony was reinforced by the witness immediately after Detective Singer, Sergeant Stauffer, who testified that he observed the Defendant operating that same vehicle immediately after exiting the residence in which one of the controlled buys took place. Finally, on cross-examination, the Defense Counsel elicited that this truck was registered in the Defendant's name. Clearly, all evidence complained of by the Appellant was personally observed by both Detective Singer and Sergeant Stauffer. It was therefore not hearsay and would not have been a basis for mistrial.

Admittedly, this testimony was made within the context of the previously objected to testimony, which advised that the Defendant was

suspected of distributing methamphetamine. However, this error was completely harmless. The *entire* basis of the Defendant's trial was that he was suspected of selling methamphetamine. Informing the jury of a given fact does not prejudice a trial where the very basis of that trial is that the defendant is suspected of selling methamphetamines.

All testimony complained of in Appellant's brief was direct knowledge of Detective Singer, and was thus not objectionable, much less the basis for a mistrial. Even had it been objectionable, as it was also testified to by Sergeant Stauffer, primarily during cross-examination by Appellant's counsel. Consequently, the Defense Counsel's failure to request a mistrial was not ineffective assistance of counsel.

4. Sufficiency of the Evidence

It is a well established principle in the American Criminal Justice System that the burden of proof rests on the state. *In re Winship*, 397 U.S. 358 (1970). The burden upon the state is one of proof beyond a reasonable doubt. RCW 9A.04.100 (2011). On appeal, claims of insufficiency of evidence require the Appellate Court to determine "whether there was sufficient evidence to justify a rational trier of fact to find guilt beyond a *reasonable doubt*" *State v. Green*, 94 Wn.2d 216 at 220 (1980)(emphasis

in original.) (Citing *Jackson v. Virginia*, 443 U.S. 307 at 318 (1979)). More specifically, “[t]he relevant question is ‘whether any rational fact finder could have found the essential elements of the crime beyond a reasonable doubt.’” *State v. Drum*, 168 Wn.2d 23, 34-35 (2010). (quoting *State v. Wentz*, 149 Wn.2d 342, 347 (2003), (citing *State v. Green*, 94 Wn.2d 216, 221 (1980))). Any “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 (1992).

The State evidence came primarily from a witness who had purchased controlled substances from the Defendant directly. Detective Singer and Sergeant Stauffer both testified to seeing the Defendant’s vehicle at the location where the sales of these drugs took place and seeing the Defendant operating that vehicle. Detective Singer testified that he observed Defendant’s vehicle at the time the buy was taking place. Sergeant Stauffer testified to seeing the vehicle at the location on a later date. The truth of all of this evidence is admitted by the Appellant and taken in the light most favorable to the State.

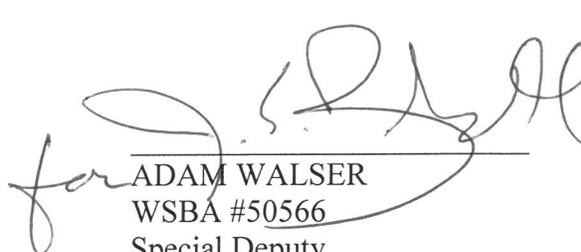
When the evidence presented by the State is admitted as true and taken in the light most favorable to the State, the evidence was clearly

sufficient to convince a rational trier of fact of the Defendant's guilt beyond a reasonable doubt. Consequently, the Appellant's request for reversal should be denied.

III. CONCLUSION

The Prosecution's remarks relating to the war during the trial were neither inflammatory or ill intentioned. The assistance of Defense Counsel was both effective and competent. The evidence presented by the State against the Defendant was far in excess of what is necessary to sustain the conviction. Consequently, Appellant's requested relief should be denied.

RESPECTFULLY SUBMITTED this 10th day of JULY, 2018


ADAM WALSER
WSBA #50566
Special Deputy
Prosecuting Attorney

WSBA

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Certificate of Mailing

I, Tami Odenrider, do hereby certify and declare that I am the administrative assistant to the Deputy Prosecuting Attorney for Lincoln County, and that I deposited in the United States Post office in the City of Davenport, Lincoln County, Washington, on the date below, a properly stamped and addressed envelope(s) directed to the appellant Ms. Andrea Burkhart, at the address of PO Box 1241, Walla Walla, WA 99362 containing a true and correct copy of: Brief of Respondent.

Dated: 7/10/18


TAMI ODENRIDER