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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 36308-2-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JAMIE LEE WALTARI,

Appellant

BRIEF OF APPELLANT JAMIE LEE WALTARI

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR6

C. STATEMENT OF THE CASE7

D. STANDARD OF REVIEW15

E. ARGUMENT.....17

F. CONCLUSION.....29

TABLE OF AUTHORITIES

Table of Cases

<u>Gordon v. Gordon</u> , 48 Wn.2d 222, 266 P.2d 786 (1954)	16
<u>In re Marriage of Spreen</u> , 107 Wn.App. 341, 28 P.3d 769 (2001)	16
<u>In re Marriage of Tang</u> , 57 Wn.App. 648, 789 P.2d 118 (1990)	16
<u>State v. Bourgeois</u> , 133 Wn.2d 945 P.2d 1120 (1997)	16
<u>State v. Brown</u> , 68 Wn.App. 480, 843 P.2d 1098 (1993)	21, 22, 23
<u>State v. Campos</u> , 100 Wn.App. 218, 998 P.2d 893 (2000)	23
<u>State v. Cauthron</u> , 120 Wn.2d 879, 846 P.2d 502 (1993)	15
<u>State v. Cobelli</u> , 56 Wn.App. 921, 788 P.2d 1081 (1989)	21
<u>State v. Crediford</u> , 130 Wn.2d 747, 927 P.2d 1129 (1996)	21
<u>State v. Cromwell</u> , 157 Wn.2d 529, 140 P.3d 593 (2006)	21
<u>State v. Dunn</u> , 125 Wn.App. 582, 105 P.3d 1022 (2005)	15
<u>State v. Eaton</u> , 143 Wn.App. 155, 177 P.3d 152, <u>aff'd</u> , 168 Wn.2d 476 (2010)	24
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 247 (1980)	7, 17, 23, 25, 28
<u>State v. Horrace</u> , 144 Wn.2d 389, 28 P.3d 753 (2001)	15
<u>State v. Hotchkiss II</u> , 1 Wn.App.2d 275, 404 P.3d 629 (2017)	22
<u>State v. Hutchins</u> , 73 Wn.App. 211, 868 P.2d 196 (1994)	22

<u>State v. Martinez</u> , 76 Wn.App. 1, 884 P.2d 3 (1994).....	18
<u>State v. Miller</u> , 131 Wn.2d 7, 929 P.2d 372 (1997).....	15
<u>State v. O’Connor</u> , 155 Wn.App. 282, 229 P.3d 880 (2010).....	22
<u>State v. Olds</u> , 39 Wn.2d 258, 235 P.2d 165 (1951)	19
<u>State v. Robinson</u> , 79 Wn.App. 386, 902 P.2d 652 (1995).....	16, 20
<u>State v. Russell</u> , 125 Wn.2d 24, 882 P.2d 747 (1994).....	15
<u>State v. Schaffer</u> , 120 Wn.2d 616, 845 P.2d 281 (1993)	19
<u>State v. Spotted Elk</u> , 109 Wn.App. 253, 34 P.3d 906 (2001).....	15, 18
<u>State v. Thomas</u> , 68 Wn.App.268, 843 P.3d 540 (1992).....	23
<u>State v. Wadsworth</u> , 139 Wn.2d 724, 991 P.2d 80 (2000)	16, 20

Other Case Law

<u>Jackson v. Virginia</u> , 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979).....	7, 17, 23, 25, 28
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Statutes

RCW 9.94A.533(6)	1, 6, 12, 13, 17, 20, 23
RCW 69.50.401(b)(2).....	11, 12, 20, 21
RCW 69.50.435(a)(3).....	1, 6, 12, 13, 17, 20, 23, 24
RCW 69.50.4013(1)	11, 12

Court Rules

CrR 2.1(d)..... 18, 19
RAP 2.5(a)(3) 16, 18
RAP 12.2 20, 24, 28, 30

Constitutional Provisions

Wash. St. Const., Art. I, sec. 22.....18
U.S. Const., amend. 5.....29
U.S. Const., amend. 14.....29

A. ASSIGNMENTS OF ERROR

1. The superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, erred on July 12, 2018, when entering its memorandum opinion, entitled “Decision After Trial,” wherein the court erroneously determined that the defendant, JAMIE L. WALTARI, was guilty as charged in all five [5] counts set forth in third amended information notwithstanding the fact that, contrary to the opinions of the superior court (a) the confidential informant, Lydia Ensley, was lacking in terms of credibility and veracity in light of her admitted willingness to lie about the facts alleged surrounding the controlled buys [sic] as well as her continued use of controlled substances, and resulting in her admitted impairment, in violation of her agreement with the Drug Task Force [CP 82-83], and (b) there was insufficient evidence in terms of the quantity to support the prosecution’s bald claim in Count 4 that Mr. WALTARI was in possession ‘with intent to deliver’ [83-84] as well as the required proof and necessary circumstances to invoke the school bus zone enhancement [RCW 69.50.435(a) and RCW 9.94A.533(6)] in connection with that charge in Count 4 [CP 84-85]. [CP 82-85].

2. In like terms, the superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, erred when allowing the prosecution to amend its initial information, and those which followed, wherein a school bus stop enhancement was added to Counts 1 through 3

of the charges against Mr. WALTARI in violation of Rule of 2.4(d) of the Superior Court Criminal Rules [CrR] which bars such amendment if substantial rights of the defendant are prejudiced thereby. [RP 17-20, 24-28, 64, 65-69, 70, 76; CP 17-23, 76, 84-85].

3. Also, the superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, likewise erred when entering its “findings of fact nos. 5 and 6” in its August 28, 2018 “findings of fact and conclusions of law after bench trial,” wherein the court improperly found, notwithstanding the absence of any credible evidence of proof beyond a reasonable doubt, that “on September 15, 2016,” the confidential informant, Lydia Ensley, had gone to Mr. WALTARI’s “residence . . . near Clarkston, Asotin County, Washington” and purchased “approximately seven grams of methamphetamine” for “two-hundred dollars [\$200.00] of the pre-recorded buy money” with the “CI then [owing] the Defendant an additional one-hundred dollars [\$100.00] for this alleged sum of contraband. [CP 101].

4. The superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, likewise erred when entering its “finding of fact no. 8” in its August 28, 2018 “findings of fact and conclusions of law after bench trial,” wherein the court in turn erroneously found, notwithstanding the absence of any credible evidence of proof beyond a reasonable doubt, that “on September 20, 2016,” when

the CI and the defendant met once again, Mr. WALTARI collected one-hundred dollars [\$100.00] that was owed him for the methamphetamine that he ‘fronted’ her on the 15th of September, 2016.’ [CP 102].

5. The superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, likewise erred when entering its ‘‘finding of fact no. 9’’ in its August 28, 2018 ‘‘findings of fact and conclusions of law after bench trial,’’ wherein the court improperly found, and notwithstanding the absence of any credible evidence of proof beyond a reasonable doubt, that ‘‘on September 28, 2016,. . . the CI, [Lydia Ensley], met with defendant[WALTARI], at 2324 Appleside Boulevard, in Asotin County, Washington, a vacant building [known] as Mr. K’s’’ whereupon ‘‘the CI purchased approximately on eighth of an ounce of methamphetamine from the Defendant with the pre-recorded money’’ constituting ‘‘one-hundred fifty dollars [\$150.00].’’ [CP 102].

6. In turn, the superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, erred when entering its ‘‘findings of fact which are numbered 11 through 14’’ and located at the bottom of page 102 [page 3 of 8] through the top of page 103 [page 4 of 8], in its August 28, 2018 ‘‘findings of fact and conclusions of law after bench trial,’’ wherein the court wrongfully found, notwithstanding the absence of any credible evidence of proof beyond a reasonable doubt, that ‘‘on October 5, 2016,. . . the CI, [Lydia Ensley], went to [Mr.

WALTARI's] residence [situated near Clarkston, Asotin County, Washington] and was [met] by the Defendant's girlfriend, Tiffany Lusby, who took her into the Defendant's bedroom," whereupon the "CI found a quantity of methamphetamine on the bed;" she then "weighed out" . . . "the agreed . . . amount on a set of scales" and which substance, weighing "quarter ounce of methamphetamine," was eventually turned over to law enforcement. [CP 102-03].

7. The superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, also erred when entering its "finding of fact no. 21" in its August 28, 2018 "findings of fact and conclusions of law after bench trial," wherein the court wrongfully found, notwithstanding the absence of any credible evidence of proof beyond a reasonable doubt, that the testimonies of "Det. Carpenter and Det. Aase . . . [based upon] their training and experience that a small quantity of drugs separately packaged from a larger quantity of drugs [is] strongly indicative of trafficking rather than [sic] personal use," and that this supposed evidence, "coupled with the evidence of the deliveries and the recording obtained during the four operations established that the Defendant possessed the larger bag of methamphetamine found in the pickup for the purpose of selling to others." [CP 104-05].

8. The superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, likewise erred when entering its

“finding of fact no. 25” in its August 28, 2018 “findings of fact and conclusions of law after bench trial,” wherein the court found by way of fractured logic, and notwithstanding the absence of any credible evidence of proof beyond a reasonable doubt, that “the CI’s testimony was credible.” [CP 106].

9. The superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, likewise erred in entering its resulting, unnumbered “conclusions of law” as set forth in its August 28, 2018 “findings of fact and conclusions of law after bench trial,” and which pertain to the court having found Mr. WALTARI guilty beyond a reasonable doubt of all five [5] charges against him, as well as his having committed the enhancement violations as alleged against him in the second and third amended complaints, but which are not supported by the record. [CP 106-07].

10. Finally, to the extent the convictions of Mr. WALTARI are subject to reversal on this appeal, the superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, likewise erred in entering its felony judgment and sentence, and accompanying Warrant of Commitment, against the defendant on August 28, 2018. [RP 328-30; 111-37, 138-47, 148].

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, improperly allowed the prosecution on October 6, 2017, to amend its initial January 26, 2017 information against the appellant, JAMIE L. WALTARI, so as to include a different crime resulting from the inclusion of a mandatory school bus stop enhancement [RCW 69.50.435(a)(3) and RCW 9.94A.533(6)] which was added to Counts 1 through 3 of the charges against him in violation of Rule of 2.4(d) of the Superior Court Criminal Rules [CrR] which bars such amendment if substantial rights of the defendant are prejudiced thereby? [Assignments of Error nos. 1, 2, 9, 10].

2. Whether the superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, improvidently held upon the evidence presented that the appellant, JAMIE L. WALTARI, was guilty of count 4 [CP 83-85] of the second and third amended informations [CP 65-69, 76, 107] with respect his being charged with ‘possession with intent to deliver’ as well as entering a finding warranting imposition of a school bus zone enhancement [RCW 69.50.435(1)(c) and RCW 9.94A.533(6)] [CP 84-85] in connection with that particular charge, count 4. [Assignments of error nos. 1, 7, 9, 10].

3. Finally, whether the defendant, Jamie L. WALTARI, was wrongfully convicted by superior court of Asotin County, State of

Washington, in criminal cause no. 17-1-00017-2, of convicted of counts 1 through 3 following the subject bench trial, insofar as the evidence and testimony of the confidential informant, Lydia Ensley, was lacking in credibility, trustworthiness and proof beyond a reasonable doubt as a matter of law, as required under State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979), in light of (a) her continued use of drugs as well as (b) her acknowledged willingness to lie, distort the facts concerning the controlled buys and mislead members of law enforcement as it suited her particular devices and purposes? [Assignments of Error nos. 1, 3 through 10].

C. STATEMENT OF THE CASE

1. Factual Background. In September 2016, detective Bryson Aase of the Whitman County sheriff's department, then assigned to the Quad Cities Drug Task Force [QCETF], began investigating JAMIE L, WALTARI concerning his alleged sales of methamphetamine and other related activities. [RP 80-81, ;CP 100]. At some point, he contacted Lydia Ensley, who had drug related charges then pending against her, for the purpose of her becoming a confidential informant [CI] in connection with his investigation. [RP 82-84; CP 101]. The stated arrangement was that, if Ms. Ensley undertook to conduct controlled buys of

methamphetamine from Mr. WALTARI, the criminal charges pending against her would be reduced and with no jail time. [RP 82, 174-75].

Thereafter, on September 15, 2016, detective Aase arranged with Ensley to make a controlled purchase of drugs from Mr. WALTARI at the latter's residence located at 1820 13th Street, near Clarkston, Asotin County, State of Washington. [RP 81, 85-87]. Prior to this contact with Mr. WALTARI, Ms. Ensley was allegedly searched beforehand by law enforcement, provided with marked funds in order to make the purchase [RP 79, 87], provided with an audibly monitor [RP 78-79], and given instructions as to what she was to do after completing the drug purchase. [CP 101]. Yet, as detective Aase admitted later at trial on July 5, 2018, prior to conducting a controlled buy, he does not search the private parts of female CIs and, in this regard, Ms. Ensley could have hidden the alleged contraband in her bra or panties before contacting the accused on this and other scheduled dates. [RP 163-64].

Thereafter, on September 15, Ms. Ensley contacted the accused at his residence and supposedly purchased approximately seven [7] grams of methamphetamine from him. [RP 89, 103, 105, 178-79, 180]. The original agreement was \$200 [RP 87] for the purchase of a one-eighth [1/8] ounce or "eight-ball" of said substance. [RP 89, 97-98]. However, Mr. WALTARI allegedly "fronted" Ms. Ensley for the remainder of the seven [7] grams with her owing him an additional \$100.00. [RP 103,

105]. Thereafter, the subject drugs were turned over to detective Aase and Ms. Ensley was debriefed. [RP 89; CP 101].

On September 20, 2016, a second purchase was allegedly arranged to occur once more at Mr. WALTARI's residence. [RP 107-08]. However, he apparently had no meth to sell at this time, so he and Ms. Ensley just smoked the small amount of meth that he had on hand. [RP 109, 113, 122, 184-85]. However, during this meeting, Mr. WALTARI allegedly took \$100.00 of the \$190.00 buy money given to Ms. Ensley so as to cover the previous sum owing on September 15. [RP; 110, 122; CP 102].

On September 28, 2016, detective Aase again arranged for Ms. Ensley to buy methamphetamine from the accused. [RP 122-23]. This transaction allegedly took place at a store location, Mr. K's, situated at 2324 Appleside Boulevard in Asotin County, State of Washington. [RP 123; 185-86]. Mr. WALTARI arrived late. When he did show up, he and Ms. Ensley went inside the store--out of the view of law enforcement. [RP 125]. During the course of this transaction, Ms. Ensley allegedly received approximately one eighth [1/8] ounce of meth which she later turned over to detective Aase. [RP 140; CP 102, 185-86].

Finally, on October 5, 2016, Ms. Ensley undertook another controlled buy of meth for \$140.00 which transaction took place once again at Mr. WALTARI's residence. [RP 142-43; 186]. Ms. Ensley went

into the house and was greeted by Tiffany Lusby who then took Ms. Ensley to the accused's bedroom. There she allegedly found a quantity of methamphetamine laying on Mr. WALTARI's bed. [RP 143-44, 146, 186-87].

Ms. Ensley then weighed and separated out the agreed amount of meth on a set of scales and then left the residence. [RP 187]. Thereafter, Ms. Ensley turned over a quarter [1/4] ounce of meth to detective Aase. [RP152-54, 187-89; CP 102-03].

With respect to all four [4] of the forgoing contacts, the record does not reflect whether any of the allegedly marked bills involved in these transactions were ever recovered by the task force let alone ever found on Mr. WALTARI's person or premises.

On January 25, 2017, Mr. WALTARI was stopped for a broken tail light on his pickup in the area of 15th Avenue and Elm Street in Clarkston, Asotin County, State of Washington after being followed for a period of time by Sheriff's Deputy Joseph Snyder. [RP 161-62, 219; CP 103]. During the course of this traffic stop, deputy Snyder determined that Mr. WALTARI's driving privileges were suspended and, consequently, he was placed under arrest. [RP 223-24; CP 104].

During a search incident to arrest, a small quantity of meth was found inside a crumpled piece of wax paper in his pants pocket, along with two [2] cell phones and a charger and \$240.00 in cash. [RP 224-25, 226-

27; CP 104]. The defendant's vehicle was impounded. A later K-9 search for contraband proved positive, and a search warrant was obtained for the pickup truck, wherein an additional 5.4 grams of methamphetamine was discovered under a seat cover in one bag. [RP 228-29, 235-36, 239-40, 242-43; CP 104].

2. Procedural History. On January 26, 2017, the Asotin County prosecutor filed an initial criminal information against the defendant, JAMIE L. WALTARI, in the superior court of Asotin County, State of Washington, under cause no. 17-1-00017-02, charging him specifically with (a) one count of having knowingly delivered a controlled substance to another, to wit: methamphetamine on September 15, 2016 in violation of RCW 69.50.401(2)(b); (b) count 2 of having knowingly delivered a controlled substance to another, to wit: methamphetamine on September 28, 2016 in violation of RCW 69.50.401(2)(b); and (c) count 3 of being in possession of a controlled substance, to wit: methamphetamine on January 25, 2017 in violation of RCW 69.50.4013(1). [CP 13-15].

Thereafter, on October 6, 2017, the Asotin County prosecutor filed an "amended information" in the same criminal proceeding against the accused in cause no. 17-1-00017-02, charging Mr. WALTARI once again with (a) one count of having knowingly delivered to another a controlled substance, to wit: methamphetamine on September 15, 2016 in violation of RCW 69.50.401(2)(b) and, further, that such offence occurred within

one thousand feet of a school route stop designated by the school district constituting a twenty-four month mandatory enhancement under RCW 69.50.435(1)(c) and RCW 9.94A.533(6); (b) count 2 of having knowingly delivered to another a controlled substance, to wit: methamphetamine on September 28, 2016 in violation of RCW 69.50.401(2)(b) and, further, that such offence occurred within one thousand feet of a school bus route stop designated by the school district constituting a twenty-four month mandatory enhancement under RCW 69.50.435(1)(c) and RCW 9.94A.533(6); (c) count 3 of having knowingly once more delivered to another a controlled substance, to wit: methamphetamine, on October 5, in violation of RCW 69.50.401(2)(b) and, further, that this offence as well occurred within one thousand feet of a school route stop designated by the school district constituting a twenty-four month mandatory enhancement under RCW 69.50.435(1)(c) and RCW 9.94A.533(6); (d) count 4 of being in possession of a controlled substance, to wit: methamphetamine, on January 25, 2017, ‘with intent to deliver’ in violation of RCW 69.50.401(2)(b) and, further, that such offence also occurred within one thousand feet of a school bus route stop designated by the school district constituting a twenty-four month mandatory enhancement under RCW 69.50.435(1)(c) and RCW 9.94A.533(6); and (e) count 5 of being in possession of a controlled substance, to wit: methamphetamine, on January 25, 2017, in violation of RCW 69.50.4013(1). [CP 24-27].

On March 5, 2018, the plaintiff, STATE OF WASHINGTON, filed a “second amended information” changing its reference to RCW 69.50.435(a)(3), rather than RCW 69.50.435(1)(c), as set forth in its previous October 6, 2017 amendment, with respect to the alleged school bus zone enhancement. Thus, the enhancement claims associated with Mr. WALTARI’s alleged criminal violations identified in counts 1 through 4 of its earlier amended information were now changed to RCW 69.50.435(1)(c) and RCW 9.94A.533(6) in terms of its “second amended information.” [CP 65-69]. In addition, it was further alleged in terms of count 4 that such delivery [sic] occurred within one thousand feet of a school bus route stop designated by the school district. [CP 68].

On May 15, 2018, the STATE OF WASHINGTON was allowed by the superior court to once more amend its information for a third time wherein the prosecution undertook to correct its enhancement allegation concerning count 4 to allege that the “possession,” rather than “delivery,” of the controlled substance occurred within one thousand feet of a school bus stop. [RP 51-53, 55-59; CP 70, 76].

On July 5, 2018, trial commenced in this case. [RP 63, et seq.]. Prior to this time, the defendant, JAMIE L. WALTARI, waived his right to a jury trial, and the case proceeded as a bench trial before the court. [Id.]. Following trial, on July 12, 2018, the court entered as memorandum opinion wherein the court held that Mr. WALTARI was guilty as charged

with respect to counts 1 through three and 5 of the third amended complaint. [CP 82]. In addition, the court determined that with respect to count 4 that the STATE had proven, beyond a reasonable doubt, that the surrounding circumstance associated with that possession established the defendant was in said possession of a controlled substance with the ‘‘intent to deliver.’’ [CP83-84]. Finally, the court held that the prosecution had likewise, proven beyond a reasonable doubt, that the incidents associated with counts 1 through 4 had occurred within one thousand feet of a school bus zone. [CP 84-85].

Thereafter, on August 28, 2018, findings of fact and conclusion of law were entered by the trial court.[CP 100-107]. A sentencing hearing was held on this same date. [RP 314-36].

At the conclusion of that hearing, the court accepted the defendant’s recommendation for imposition of a Drug Offender Sentencing Alternative [DOSA] program in this case under RCW 9.94A.660 [CP 93-97], wherein Mr. WALTARI was sentenced to 57 months terms of counts 1 through 4, a mid-range of 18 months was imposed regarding count 5, and a sentence of prison time to 12 months incarceration. [RP 328-30; CP142, 148].

This appeal follows. [CP 151; spindle]. Additional facts and circumstances are set forth below as they apply to a particular issue or argument now on appeal.

Finally, it should be noted that, on September 19, 2018, the Asotin County prosecutor has seen fit to file a notice of cross appeal in this matter seeking review of the judgment and sentence entered by the superior court on August 28, 2018. [CP 155]. Appellant opposes the same; he will file the appropriate respondent's brief thereto at the stated time following the submission of the STATE's opening brief regarding said cross-appeal.

D. STANDARD OF REVIEW

Errors of law involving evidentiary matters, including those of a constitutional magnitude, are reviewed de novo. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001); see also, State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993); State v. Dunn, 125 Wn.App. 582, 690, 105 P.3d 1022 (2005). In a criminal case, an error of constitutional magnitude is presumed prejudicial and requires reversal unless the prosecution establishes, by way of the remaining competent evidence in the case, that such error was harmless beyond a reasonable doubt. State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001); see also, State v. Miller, 131 Wn.2d 78, 90, 929 P.2d 372 (1997); State v. Russell, 125 Wn.2d 24, 94, 882 P.2d 747 (1994). Such error of constitutional magnitude, including a prohibited judicial comment on the evidence under Article IV, §16, of the Washington state constitution, may be raised for the first time on appeal. See, State v. Levy, 156 Wn.2d, 709, 719-20, 132

P.3d 1076 (2006); State v. Sivins, 138 Wn.App. 52, 59, 155 P.3d 982 (2007) see also, RAP 2.5(a)(3).

By the same measure, questions of statutory interpretation are also reviewed de novo. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000).

In terms of any aspect of review associated with the exercise of discretion by the trial court, the governing standard is whether there has been a manifest abuse of discretion committed by said court. State v. Bourgeois, 133 Wn.2d 389, 406, 945 P.2d 1120 (1997). The trial court will be deemed to have so abused its discretion when it can be said the court acted on untenable grounds or for untenable reasons, or has erroneously interpreted, applied or chosen to ignore the governing law. Gordon v. Gordon, 44 Wn.2d 222, 226-27, 266 P.2d 786 (1954); State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990). In other words, misapplication or a distortion of the law constitutes a manifest abuse of discretion warranting reversal on appeal. In re Marriage of Spreen, 107 Wn.App. 341, 346, 28 P.3d 769 (2001).

Finally, the standard for review governing the sufficiency of evidence to criminal convict a defendant is whether, after viewing the evidence in the light most favorable to the prosecution, a rationale trier of fact could have found the essential elements and facts of the crime beyond

a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979).

E. ARGUMENT

1. The superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, improperly allowed the prosecution on October 6, 2017, and again March 5 and May 15, 2018, to amend its initial January 26, 2017 information against the appellant, JAMIE L. WALTARI, so as to include a different crime, as well as a mandatory school bus stop enhancement, being added to the existing Counts 1 through 3 of the existing charges [RCW 69.50.435(a)(3) and RCW 9.94A.533(6)] against him in violation of Rule of 2.1(d) of the Superior Court Criminal Rules [CrR] which bars such amendment if substantial rights of the defendant are prejudiced thereby. [Issue No. 1].

By way of allowing the plaintiff, and respondent herein, STATE OF WASHINGTON, to amend its original information and continue to proceed in the criminal case against the defendant, JAMIE L. WALTARI, the superior court improperly permitted the respondent to enhance and elevate the charges associated with counts 1 through 3 resulting in substantial and undue prejudice to the due process rights of the accused in terms of his then being faced with a mandatory twenty-four [24] month sentence under RCW 69.50.435(1)(c) and RCW 9.94A.533(6). Even though the defendant did not specifically raise this issue at the trial, it is

abundantly clear that an error of constitutional magnitude may be raised for the first time on appeal as contemplated under RAP 2.5(a)(3) and that such error will be presumed prejudicial, and subject to reversal on appeal, unless the prosecution establishes that such error was harmless beyond a reasonable doubt. State v. Spotted Elk, 109 Wn.App. 253, 261, 34 P.3d 906 (2001).

In this regard, the appellate court in State v. Martinez, 76 Wn.App. 1, 884 P.2d 3(1994) observed that CrR 2.1(d) must be read in light of Article I, section 22, of the Washington State Constitution which mandates that “in criminal prosecutions, the accused shall have the right . . . to demand the nature and cause of action of the accusation against him.” In other words, the limitations on an amendment to criminal information under CrR 2.4(d) implicate our state constitution and can, therefore, an issue associated therewith may be raised for the first time on appeal under RAP 2.5(a)(3). Id.

Here, the amended information did not encompass or relate to new facts which were not otherwise known or could have been easily know on January 26, 2017 [CP 13-15], when the original information was filed against the accused. [CP 124-28] Likewise, this October 6 amendment was not a mere typographical change having no significant consequence or

impact on the rights of the accused. Rather, the amendment to counts nos. 1 through 3 essentially involved more serious charges be alleged, along with an increase or enhancement of the penalties associated therewith.

In this vein, the Washington supreme court's decision in State v. Olds, 39 Wn.2d 258, 235 P.2d 165 (1951) is dispositive. When interpreting the procedural predecessor to CrR 2.1(d), the supreme court held, without hesitation, that the government's ability to amend a criminal information does not encompass the changing of an existing charge, in the absence of a substantial change in the facts which were non-existent at the time of the original filing of charges; any interpretation otherwise would run entirely afoul of the guarantees of due process under the state and federal constitutions. See also, State v. Schaffer, 120 Wn.2d 616, 845 P.2d 281 (1993). In effect, it remains a basic tenant of law that the rules of criminal procedure cannot be arbitrarily construed by the judiciary or the prosecution so as to affect or derogate from the defendant's fundamental, constitutional rights including the right to know the precise charges against him, as in this case. See, State v. Berry, 31 Wn.App.408, 641 P.2d 1213 (1982).

Any other rule or practice would clearly constitute a manifest abuse of discretion on the part of the court. Id.; see also, State v.

Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995). For this reason alone, the challenged October 6 amendment by the prosecution should have been stricken and, consequently, this case is now subject to reversal on this appeal. RAP 12.2.

2. Likewise, the superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, misapplied the law when holding the appellant, JAMIE L. WALTARI, guilty of count 4 [CP 83-85] as set forth in the second and third amended informations [CP 65-69, 76, 107] with respect his having been in "possession with intent to deliver" while similarly finding and imposing an school bus zone enhancement therewith under RCW 69.50.435(a)(3) and RCW 9.94A.533(6). [Issue no. 2].

Following trial, the superior court determined that, with respect to the methamphetamine found in the defendant's truck on January 25, 2017, that JAMIE L. WALTARI was guilty of count 4 in terms of his having been "in possession with intent to deliver" [RCW 69.50.401(2)(b)]. [CP 83-84]. The superior court then went on and imposed an enhancement as contemplated under RCW 69.50.435(a)(3) and RCW 9.94A.533(6) in connection with Mr. WALTARI having been stopped by law enforcement "within 1,000 feet of a school us zone." [CP 84].

Once again, questions of statutory interpretation are reviewed de novo. State v. Wadsworth, 139 Wn.2d 724, 734, 991 P.2d 80 (2000). In

this vein, the courts are to determine and carry out the underlying intent and purpose of the legislature, while avoiding any arguable constitutional deficiencies. State v. Cromwell, 157 Wn.2d 529, 539, 140 P.3d 593 (2006); State v. Crediford, 130 Wn.2d 747, 755, 927 P.2d 1129 (1996).

By the same measure, the courts are required to presume that the legislature did not intend any ‘absurd results.’ State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

In determining whether the amount of drugs found, and any other surrounding circumstances, support a finding of intent to deliver beyond a reasonable doubt under RCW 69.50.401(2)(b), the court must be mindful of the clear distinction between the mere possession of the controlled substance of the defendant and the situation where such possession necessary demonstrates an intent to deliver the same to another person. State v. Brown, 68 Wn.App.480, 843 P.2d 1098 (1993). In this regard, the mere possession of drugs, without more, raises no interference whatsoever of an intent to deliver. State v. Cobelli, 56 Wn.App. 921, 925, 788 P.2d 1081 (1989).

In this instance, the STATE OF WASHINGTON as well as the court relied upon the fact Mr. WALTARI was found with 5.4 grams of methamphetamine after his vehicle was stopped on January 25 2017,

along with the circumstance that he had \$240.00 on his person along with two [2] cell phones and a charger. It is a longstanding legal premise that an officer's opinion, without more, that the quantity of a controlled substance seized is not associated with mere personal use, is insufficient in itself to prove, beyond a reasonable doubt, that said contraband was in fact possessed with intent to deliver. State v. Hutchins, 73 Wn.App. 211, 217, 868 P.2d 196 (1994); see also, State v. O'Connor, 155 Wn.App. 282, 290, 229 P.3d 880 (2010); Brown, at 482-485.

Here, the amount of methamphetamine at issue [5.4 grams], was clearly not indicative of any intent on the part of the defendant to deliver. Rather, the quantity of meth obtained from his vehicle on January 25, 2018, was entirely consistent with said drugs being kept by Mr. WALTARI for his own personal use over a period of time.

Suffice it to say, the record is replete with Mr. WALTARI being an addict himself when he was stopped by police on that date. Likewise, the additional factor that he had \$240.00 in cash on his person is not evidence beyond a reasonable doubt, of any intent to deliver. This small sum of cash is innocuous at best and does not represent a sum normally associated with drug trafficking. Cf., State v. Hotchkiss II, 1 Wn.App.2d 275, 404 P.3d 629 (2017), involving \$2,150.00 in cash; see also, State v.

Campos, 100 Wn.App. 218, 223-24, 988 P.2d 893 (2000), involving \$1,750.00 in cash; see also, Brown, at 484.

By the same measure, the alleged fact Mr. WALTARI was in possession of two [2] cell phones, and a charger, is equally innocuous in nature. There was no testimony offered by the prosecution suggesting that the mere possession of these items was in any sense indicative of intent to deliver on the part of the defendant. Likewise, there was no evidence showing that either of these phones was in fact used in any drug transaction. Similarly, the mere fact Mr. WALTARI had previously sold drugs some months or years earlier adds nothing to the mix in terms of proof beyond a reasonable doubt of any intent to deliver in this instance with respect to his detention on January 25, 2017. Id.; see also, State v. Thomas, 68 Wn.App. 268, 273, 843 P.2d 540 (1992).

Hence, the defendant's conviction for possession with intent to deliver, in terms of count 4, is clearly subject to reversal for lack of proof beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979). Since there is no underlying crime to which an enhancement under the provisions of RCW 69.50.435(a)(3) and RCW 9.94A.533(6) can attach, such enhancement also fails and is likewise

subject to reversal on this appeal. RAP 12.2.

Even assuming, arguendo, that count 4 itself could somehow be allowed to stand on this appeal, the school bus zone enhancement associated therewith nonetheless fails on its own. In this vein, there was ‘no act of volition’ placing Mr. WALTARI at the location where he was followed, surveiled several blocks, and eventually stopped by law enforcement on January 25, 2017. This process or chain of events leading to the traffic stop was strictly the decision of police to place Mr. WALTARI at this particular geographical location. Thus, there was no actus reus on the defendant’s part so as to warrant an enhancement under RCW 69.50.435. See, State v. Eaton, 143 Wn.App. 155, 157, 164-65, 177 P.3d 157 (2008), aff’d, 168 Wn.2d 476 (2010).

Simply put, in terms substantive due process, said enhancement statute was clearly not intended by the Washington legislature to convict or punish a defendant for his involuntary acts or the acts of another. Id. Instead, such heightened penalty can only lawfully be imposed when the accused was entirely free from any police restraint, and where he was acting strictly on his own volition rather than being placed or detained by the government at a particular location. Id.

3. Finally, whether the defendant, Jamie L. WALTARI, was wrongfully convicted of counts 1 through 3 by superior court of Asotin County, State of Washington, in criminal cause no. 17-1-00017-2, following the subject bench trial, insofar as the prosecution's evidence and testimony of the confidential informant, Lydia Ensley, was lacking in terms of credibility and trustworthiness so as to fall short of constituting proof beyond a reasonable doubt as required under State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979? [Issue no. 3].

Finally, it is axiomatic to this court's review herein that the heart and soul of the prosecution's case against the defendant, JAMIE L. WALTARI, rested upon the integrity and reliability of its principle witness, and so-called confidential informant [CI], Lydia Ensley, concerning her alleged "controlled buy" of methamphetamine associated with counts 1 through 3 against the accused. A simple review of Ms. Ensley's testimony at trial [RP 261-71], coupled with that of other defense witnesses, including Eric Lee Hagen [now Gireth] [RP 272-82] and Detective Bryson Aase [RP 283-91], leaves no doubt Ms. Ensley was neither a credible nor truthful witness, in terms of the superior court having wrongfully convicted Mr. WALTARI on these charges beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980); see also, Jackson v. Virginia, 443 U.S. 307, 61 L.Ed.2d 560, 99

S.Ct. 2781 (1979).

By way of her own admission against interest, Ms. ENSLEY was without question lacking both in terms of honesty as well as sobriety, while doing the bidding of the Quad-City Drug Task Force [QCDF]. [RP 270-71, 273, 278-79]. Stated differently, she did not feel bound in the least to act in a forthright manner when playing the part of a confidential informant [CI]. [Id.]. Rather, Ms. Ensley acknowledged that she was playing both sides of the fence in order to reduce the two [2] pending charges against her for delivery of a controlled substance while continuing to be a part of local drug culture in Asotin County. [RP 82, 189-90, 268, 296-97].

In fact, in July 2018, she contacted Mr. WALTARI's then-attorney, Monica Brennan, and informed the latter that she would be willing to recant and back away from her claims against Mr. WALTARI regarding the alleged "controlled buys" from him so as undo this transgression which had been visited upon him. [RP 263-64, 265, 269-71]. Adding to this incriminating evidence going directly to the heart of her credibility, Ms. ENSLEY further admitted at trial that she had failed to abide by the QCDF's strict guidelines against drug use and other criminal activities while acting as a CI. In this regard, she continued to

use drugs and was “high” throughout the time she in the employ by the QCDTF. [RP 263-64, 265, 270-71]. In fact, on at least one occasion, she admitted “smoking” meth with the defendant during the failed attempt to purchase drugs from him on September 20, 2016. [Id.; RP 109, 113, 122, 184-85]. Also, while testifying at trial, Ms. Ensley indicated that she had purposely misled and distorted the truth with respect to her continued drug usage, when dealing with the QCDTF, along with other facts and circumstances including her living arrangements as well as those persons she associated with including various places she and her friends, including Ms. Gireth, had stored or hidden their personal belongings including ostensibly contraband. [RP 174-75, 175-76, 189, 189-90, 192, 262-63, 263-64, 265, 267-68, 270-71, 275, 278-79].

Hence, it was clear the members of the QCDTF involved in this case had exercised little, if any, control over Ms. Ensley or monitoring her activities so as to insure she was acting as a trustworthy capacity as a CI rather than continuing to embark on her criminal endeavors and drug-related activity. [RP 285-90]. In fact, at trial, detective Aase testified that he was entirely unaware Ms. Ensley was continuing to use meth while directly in his employ. [RP 168-69]. Had he known this, he would not have used her as CI. [RP 83-84]. Presumably, this was because her

credibility would have been drawn into irreconcilable doubt, as it clearly is in this case. [Id.].

Based upon these specific facts and circumstances submitted at trial, Mr. WALTARI now submits the prosecution's claims associated with Ms. Ensley's having allegedly purchased meth from him does not rise to the level of proof beyond a reasonable doubt due to this witness' own admitted proclivity to lie, mislead and distort the truth in order to serve her particular needs and purposes. Given this fundamental infirmity associated with her character and her veracity, such taint requires the reversal of the defendant's convictions on counts 1 through 3 of the amended informations, and the case in turn remanded to the superior court with instructions to dismiss these charges with prejudice.¹ [CP 82-85, 100-07, 138-47, 148]. Green, at 221; see also, Jackson v. Virginia, supra; RAP 12.2.

At the very minimum, due process and fundamental fairness require that the government should not be allowed to make use of a so-called confidential informant [CI] when the government either knows, or should know, that said person is continuing to engage in criminal

activities. Allowing the government to make use of person's tainted and unreliable evidence against an accused, after having failed to monitor and reign in that CI into strict compliance with its rules of engagement threatens the basic integrity of our overall judicial process. Analogous to the "fruit of the poisonous tree" doctrine, a CI's putative evidence in this situation should be considered verboten, and strictly barred from any use by the prosecution and, thus, stricken from the record by the court. Due process and fundamental fairness under both our state and federal constitution require nothing less in this instance. See, Wash.St.Const, Art. I, §§ 3 & 22; U.S.Const., amend. 5 & 14. Ms. Ensley could not be trusted as an honest witness and, accordingly, the appellant's convictions on counts 1 through 3 must fail. Given her admitted propensity to lie and mislead, there was no evidence beyond a reasonable doubt presented by the prosecution establishing that Ms. Ensley general character in terms of trustworthiness in terms of the criminal allegations made against the accused.

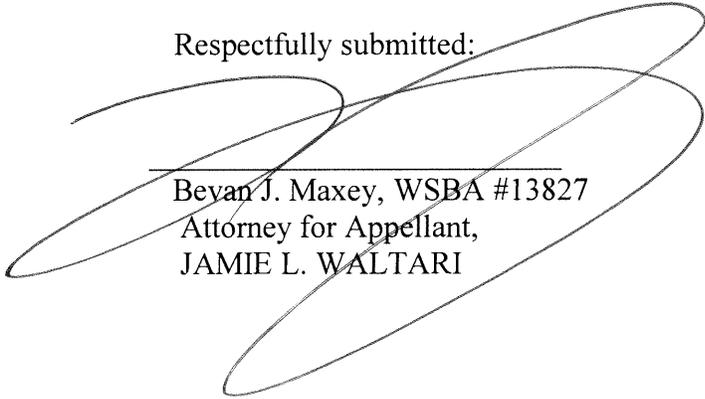
F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, JAMIE L. WALTARI, respectfully requests that the convictions and resulting "judgment and sentence" which was erroneously entered against

him in this matter by the superior court of Asotin Spokane County, State of Washington, on August 28, 2018, in cause no, 17-1-00017-2, be reversed and remanded by this reviewing court with instructions that all charges including counts 1 through 5 be dismissed with prejudice. RAP 12.2.

DATED this 11th day of February, 2019.

Respectfully submitted;



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