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Division III  
State of Washington  
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No. 36660-0-III

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

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STATE OF WASHINGTON,

Respondent,

v.

PAULA MACHELE GARDNER,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SPOKANE COUNTY

The Honorable Judge John Stromaier

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APPELLANT'S REPLY BRIEF

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## A. INTRODUCTION

Appellant Paula M. Gardner accepts this opportunity to reply to the State's brief. Ms. Gardner requests that the Court refer to her opening brief for issues not addressed in this reply.

## B. COUNTERSTATEMENT OF THE FACTS

Ms. Gardner offers the following counterstatement of the case, in response to the State's comments on the evidence. (State's Response Brief, pg. 1-8).

The State asserts that after Ms. Gardner entered a plea of guilty, the State uncovered significant evidence that much of what she told law enforcement was "false." (State's Response Brief, pg. 3, citing RP 39). However, the State cites to a portion of the record where Deputy McLagan improperly testified as to Ms. Gardner's truthfulness; one witness may not testify as to the veracity of another. *State v. Demery*, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001). Ms. Gardner requests this Court not consider this blanket assertion by the State in its response brief. (State's Response Brief, pg. 3, citing RP 39).

The State correctly asserts "Deputy McLagan *inferred* that the Appellant's 'plan' was to pin her crime on Mr. Jackson by feigning fear and thereby receive a reduced charge." (State's Response Brief, pgs. 4-5, citing RP 41-42) (emphasis added). While it is true the deputy inferred this and the trial court allowed him to testify as to his speculative belief, this was improper speculation testimony and should not be considered by this Court on appeal. *State v. Kilgore*, 107 Wn. App. 160, 185, 26 P.3d 308 (2001), *aff'd on other grounds*, 147 Wn.2d 288 (2002) (evidence that is "remote, vague, speculative, or argumentative" confuses the issues and should be excluded by the court).

The State asserts Deputy McLagan found evidence that Ms. Gardner lied when she stated Mr. Jackson was a Palmer Block Crip gang member. (State's Response Brief, pg. 5). The State asserts the deputy is uniquely familiar with the habits of that particular gang, and such a gang member would never wear red. (*Id.*). However, the deputy's assertion that Ms. Gardner was lying about Mr. Jackson's gang affiliation during the free talk is tenuous. Ms. Gardner said Mr. Jackson recently moved from California, the deputy did not appear to inquire with California law enforcement regarding Mr. Jackson's status, and any knowledge the deputy had about gang colors was affiliated more with his experiences growing up in California than being in law enforcement. (CP 57; RP 42, 148).

The State also cites as fact another portion of Deputy McLagan's testimony wherein the deputy concludes that because Ms. Gardner allegedly impersonated Mr. Jackson to send messages to his ex-girlfriend, Ms. Gardner must also have sent herself threatening Facebook messages from Mr. Jackson's profile. (State's Response Brief, pgs. 5-6). Deputy McLagan's speculative testimony regarding this matter should not be considered by this Court, as the State did not present any actual evidence this could be true. *Kilgore*, 107 Wn. App. at 185.

The State correctly states Ms. Gardner testified she did not want to be in court at the same time as Mr. Jackson. (State's Response Brief, pg. 7). However, the State failed to mention the reason Ms. Gardner did not want to be in court the same time as Mr. Jackson was because she was testifying against him. (State's Response Brief, pg. 7; RP 209).

The State correctly states Ms. Gardner did not, at the first plea withdrawal hearing which was held on June 5, 2018, present any evidence, call any witnesses, or testify on her behalf. (State’s Response Brief, pg. 10; RP 30-59). However, the State also does not acknowledge the trial court believed Ms. Gardner’s prior trial counsel was unprepared for the June 5th hearing and provided ineffective assistance of counsel, which appeared to be a factor in why the court allowed a second hearing to occur. (CP 65-66; RP 104, 110, 114). Ms. Gardner cannot be faulted for failing to present evidence or testify at the first hearing when her counsel (at the time) was completely unprepared. (RP 104, 110, 114).

### **C. ARGUMENT IN REPLY**

#### **1. Whether the trial court erred in vacating the defendant’s plea of guilty to criminal trespass in the first degree.**

This argument pertains to Issue 1, raised in Ms. Gardner’s opening brief. (Appellant’s Opening Brief, pgs. 20-26).

Several times throughout its brief, the State uses Deputy McLagan’s opinion testimony as proof that Ms. Gardner violated the terms of plea agreement being other than truthful. (State’s Response Brief, pgs. 1-15). However, just because Deputy McLagan “inferred” Ms. Gardner’s plan was to have her charges reduced, that he thought what she stated in the free talk was “false,” or that he thought it was “likely” she sent herself social media threats, does not mean her statements were false. (State’s Response Brief, pgs. 3, 4-5). As set forth in Ms. Gardner’s opening brief, the State never presented actual evidence to show she was being untruthful. (Appellant’s Opening Brief, pgs. 1-26). The State merely gives blanket statements alleging Ms. Gardner was untruthful and that because she wanted her charges reduced and had a “plan” to do so she must have had

a nefarious plot other than simply wanting to exchange information for less confinement time. (State's Response Brief, pg. 12-15).

The deputy's inferences and opinions are not evidence. The facts are evidence and the State did not present the facts it needed to show Ms. Gardner was making false statements. The trial court abused its discretion when it withdrew Ms. Gardner's plea of guilty to the crime of criminal trespass. The case must be reversed for reinstatement of the plea.

**2. Whether the jury's verdict does not support the sentence for possession of methamphetamine, were the to-convict instruction did not specify which controlled substance was possessed, requiring remand for resentencing to impose a misdemeanor sentence.**

This argument pertains to Issue 2 raised in Ms. Gardner's opening brief. (Appellant's Opening Brief, pgs. 27-32).

The State acknowledges the case law supports the conclusion that "failure to specify a controlled substance cannot be cured" by the to-convict instructions merely referring back to the charging document. (State's Response Brief, pgs. 16-17). However, the State argues that although here the verdict form did not expressly state the controlled substance was methamphetamine, the fact the form did expressly state the controlled substance was "other than marijuana" was enough to support a felony sentence. (State's Response Brief, pg. 17-18). The State cites to both *State v. Barbarosh*, 10 Wn. App.2d 408 (2019) and *State v. Rivera-Zamora*, 7 Wn. App. 2d 824 (2019) to support its argument. (State's Response Brief, pg. 16-17). However, these cases are not helpful to the State.

In *Rivera-Zamora*, the situation was different than this one. 7 Wn. App. 2d 824 (2019). There, the to-convict instruction did not specify a controlled substance. *Id.* at

829. However, the verdict form *did* identify the controlled substance of methamphetamine. *Id.* Because the jury “expressly found” the defendant there possessed methamphetamine, the felony sentence was authorized by the jury and the court did not err for sentencing the defendant as such. *Id.* The *Rivera-Zamora* case is distinguishable from Ms. Gardner’s because in Ms. Gardner’s situation neither the to-convict instruction nor the verdict form specified what controlled substance Ms. Gardner was guilty of possessing. (CP 287, 290).

Also, the State’s citation to *State v. Barbarosh*, 10 Wn. App. 2d 408 (2019) is not supportive of its arguments. (State’s Response Brief, pgs. 16-17). In *Barbarosh*, the to-convict instruction also did not specify the controlled substance. *Id.* at 418. And the verdict form merely stated the jury found the defendant guilty of “Unlawful Possession of a Controlled Substance as *charged in Count I*” with no other written instructions as to which controlled substance Count I pertained. *Id.* at 418. The court concluded that without “an express jury finding based on the instructions as a whole, the trial court was not authorized to sentence [the defendant] as if the jury had found he had possessed methamphetamine.” *Id.* at 418 (internal quotations omitted).

Here, while the jury found Ms. Gardner guilty of a possession of a controlled substance “other than Marijuana in Count II,” the jury did not expressly authorize her sentence for possession of methamphetamine. *Barbarosh*, 10 Wn. App. 2d at 418; (CP 290; Appellant’s Opening Brief, pgs. 31-32). The State argues the other possession statutes of the RCW should fill in where the jury did not expressly find the type of controlled substance Ms. Gardner possessed. (State’s Response Brief, pg. 17). However, the felony sentence should not be imposed by default when the jury did not expressly

make a finding as to guilt on a specific controlled substance. *Barbarosh*, 10 Wn. App. 2d at 418 (jury must expressly authorize for a felony sentence).

For these reasons, the felony sentence for possession of methamphetamine was not authorized by the jury. (CP 287, 290). The case must be remanded for resentencing

#### **D. CONCLUSION**

Based upon the arguments set forth above and those set forth in Ms. Gardner's opening brief, her case should be remanded for reinstatement of the original plea of guilty to criminal trespass in the first degree.

Further, the trial court erred by sentencing Ms. Gardner to a felony sentence which was not expressly authorized by the jury verdict. The case should be remanded for resentencing.

Respectfully submitted this 6th day of March, 2020.

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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON )  
Plaintiff/Respondent ) COA No. 36600-6-III  
vs. )  
 )  
PAULA MACHELE GARDNER, ) PROOF OF SERVICE  
 )  
Defendant/Appellant )  
\_\_\_\_\_ )

I, Jill S. Reuter, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on March 6, 2020, I deposited for mailing by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's reply brief to:

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