70806-6

70806-6

No. 70806-6-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

ALAN NORD,

Appellant.

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

APPELLANT'S OPENING BRIEF

RICHARD W. LECHICH
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. INTRODUCTION

"Involvement of government officers in the production of testimony with an eye toward trial presents unique potential for prosecutorial abuse." Crawford v. Washington, 541 U.S. 36, 56 n.7, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). At the center of the prosecution against Alan Nord for delivery of a controlled substance was a government agent, an informant. The State, however, chose not to call this informant at trial. Nevertheless, a police officer testified about statements the informant made. Admission of this testimonial hearsay as substantive evidence violated Nord's constitutional right to confront the witnesses against him and the rules of evidence. Because the error was prejudicial, this Court should reverse the delivery conviction. For other reasons, this Court should reverse the convictions for attempting to elude a pursuing police vehicle and possession of a controlled substance.

B. ASSIGNMENTS OF ERROR

1. The court violated the defendant's right of confrontation by admitting testimonial statements from an informant.

2. In violation of the rules of evidence, the court admitted inadmissible hearsay.

3. The court erred in instructing the jury on accomplice liability. CP 34 (Instruction No. 8); CP 38 (Instruction No. 12).

4. The charging document alleging attempting to elude a pursuing police vehicle failed to include all the essential elements of the offense.

5. The court erred by failing to instruct the jury on the defense of unwitting possession.

6. Prosecutorial misconduct deprived the defendant of his right to a fair trial.

7. The court failed to instruct the jury that the charge of possession of controlled substance could not be based on the same act as the charge for delivery of controlled substance. CP 40 (Instruction 14).

8. The court erred by not vacating the conviction for possession because it violated the prohibition against double jeopardy.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. In general, testimonial statements from an absent witness must be excluded under the confrontation clause. A statement is testimonial if a reasonable person in the declarant's position would anticipate his statement being used against the accused. The informant, who was working for the government in exchange for leniency, made statements to Nord over the phone in the presence and at the behest of a police detective. The informant did not testify. Did the admission of these statements violate Nord's right to confront the witnesses against him?

2. Absent an exception, out-of-court statements offered to prove the truth of the matter asserted are inadmissible. Over Nord's objection, a police officer testified that an informant told Nord over the phone that he wanted to buy a quarter ounce of methamphetamine. While arguing the statement was not admitted for the "truth," the prosecutor used the statements to argue that Nord was complicit in any delivery and that the amount of methamphetamine the informant received, a quarter ounce, matched the requested amount. Did the court err admitting the informant's statements?

3. Under due process, all essential elements of the offense must be contained in the information. The allegation of attempting to elude a pursuing police vehicle failed to allege that Nord acted "willfully." Rather than alleging that Nord "willfully" failed to stop, the information only alleged that the Nord failed to stop. Should the eluding conviction be reversed because this essential element cannot be found or fairly implied from the charging document?

4. A trial court must instruct the jury on a party's theory of the case if the law and evidence support it. After a car chase and impoundment of the car, police found a bag of methamphetamine on the floor of the car. Nord had been driving the car with two passengers. The evidence did not establish that he was the owner of the car. Nord

requested an instruction on the defense of "unwitting possession." Did the trial court err in refusing to give the requested instruction?

5. A prosecutor should not make arguments to the jury appealing to passions or prejudices. During closing arguments, the prosecutor compared Nord to a "madman" and argued that the actions of law enforcement in apprehending him were "heroic." He asserted that acquitting Nord would send the wrong message to law enforcement. Did this flagrant and ill-intentioned misconduct deprive Nord of a fair trial?

6. Nord was convicted of both delivery of a controlled substance and possession of a controlled substance. A conviction for possession based on the same evidence of delivery violates the prohibition against double jeopardy. The charging document alleged that both acts occurred on the same day. The jury instructions did not ensure that a guilty determination for possession would not be based on the same evidence as the delivery. Because the two convictions may be based on the same evidence, should the possession conviction be vacated?

7. For the delivery of a controlled substance conviction, the applicable standard sentencing range was 60 to 120 months. The court justified a top-end sentence of 120 months on the facts from the eluding conviction. A court may not rely on uncharged crimes or acquitted conduct to support a sentence. If the delivery conviction is affirmed, but

the eluding conviction is reversed, should this court remand for resentencing on the delivery conviction?

D. STATEMENT OF THE CASE

The State charged Alan Nord with four counts: (1) delivery of a controlled substance, methamphetamine;[1] (2) possession of a controlled substance, methamphetamine;[2] (3) attempting to elude a pursuing police vehicle;[3] and (4) assault in the third degree.[4] CP 13-14.

According to testimony from law enforcement officers, the Bellingham Police Department attempted to conduct a controlled buy of methamphetamine from Nord on April 10, 2013. RP 152, 181. Officer William Medlen[5] testified that he was working with an informant named Brad Cave. RP 180, 201. In exchange for leniency in an investigation against him, Cave agreed to help police gather evidence and successfully prosecute other people. RP 195-97. Absent Cave's agreement, he faced

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[1] RCW 69.50.401(2)(b).

[2] RCW 69.50.4013(1).

[3] RCW 46.61.024. The State also alleged that the commission of the offense endangered one or more persons for the purposes of RCW 9.94A.533(11).

[4] RCW 9A.36.031(1)(a) and (g).

[5] At the time of the operation, Medlen's title was detective. RP 201.

possible imprisonment. RP 209. As part of the "contract," Cave understood that he could be called to court to testify. RP 209.

Around noon on April 10, 2014, Cave, in Medlen's presence, made a call. RP 181. Medlen put his ear up to the receiver and listened in on the call. RP 181-82. Medlen claimed to recognize the voice on the other end of the phone as Nord's. RP 182. Over Nord's hearsay objection, Medlen testified that Cave told Nord that Cave was interested in buying a quarter ounce of methamphetamine. RP 182-83. According to Medlen, Nord said he was out of town and would be back in Bellingham in a few hours. RP 183. After a few more phone calls, they agreed to meet at Cave's residence. RP 183. The police did not search Cave's residence before the meeting. RP 204.

Law enforcement set up surveillance around Cave's residence, but the surveillance did not cover the entry into the home. RP 185, 187. The entrance was at the back of the building, out of view. RP 216.

After Cave had gone to his home, Medlen, who was about 30 to 40 yards north of the home, saw a Honda enter the driveway leading to the home. RP 187. Police believed that Nord would be in a Honda. RP 155. Medlen could not see beyond the driveway to the residence. RP 210, 216. Similarly, the surveillance team was unable to see Cave. RP 205. About

15 minutes after arriving, the Honda pulled out of Cave's driveway. RP 179, 188, 210.

As the Honda was driving north, police deployed spike stripes on the road. RP 41. The Honda drove over the spike stripes, damaging its tires. RP 41. The Honda continued its course and eventually headed southeast. RP 35. A police car chase ensued. RP 43-44. After following the Honda for a number of miles, a law enforcement officer used his car to push the Honda off the road in Alger. RP 123-24. The police arrested the driver, Nord. RP 64. Two adult passengers, one man and one woman, were in the car. RP 65.

After the Honda left Cave's driveway, Medlen met Cave. RP 188. Cave gave him a quarter ounce of methamphetamine. RP 188-89, 217. After conducting a cursory search of Cave's residence, without any drug dogs, police did not find any drugs. RP 190, 213-14. Police also did not find any of the "buy" money on Cave or at his home. RP 190. Earlier, Medlen had checked out $300 in twenty dollar denominations and given Cave $260 of it. RP 184, 194. He kept the remaining two bills on his person. RP 194.

Following the impoundment of the Honda, Medlen and another officer searched it. RP 157. They found a bag containing methamphetamine on the floor of the car. RP 101, 157. They also found a

wallet with Nord's identification on the floor of the car. RP 160. The wallet had $130 inside. RP 193. A $20 bill in the wallet matched one of the bills given to Cave. RP 194-95. Medlen did not know what happened to the other $240. RP 207.

At trial, the State did not call Cave. Officer Medlen was permitted to testify as to what Cave said to Nord on the phone. RP 182-83. Over Nord's objection, the court instructed the jury on accomplice liability based on Cave's statements. RP 262-64. The jury found Nord guilty of the two drug charges and of attempting to elude a pursuing police vehicle,[6] but acquitted him of the charge of third degree assault.[7] CP 57-58.

For the delivery conviction, the court sentenced Nord to the top-end standard range sentence of 120 months. CP 71-72. The lesser sentences of 41 months for the eluding conviction and 24 months for possession charge were to be served concurrently. CP 72. In relation to the eluding conviction, the court ordered restitution of $2,835.20 for vehicle repair. CP 78. Nord appeals.[8]

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[6] Through a special verdict form, the jury found that the act had endangered others. CP 59.

[7] The third degree assault charge was premised on Nord's actions in driving the Honda while law enforcement tried to push the Honda off the road. RP 287-88.

[8] In addition to this case, Nord is appealing a different case. That case number is 70904-6-I.

E. ARGUMENT

1. In criminal trials, the confrontation clause prohibits admission of testimonial statements from an absent informant.

The Sixth Amendment to the United States Constitution[9] and article 1, section 22 of the Washington Constitution,[10] guarantee criminal defendants the right to confront and cross-examine witnesses. The confrontation clause of the Sixth Amendment "applies to 'witnesses' against the accused–in other words, those who 'bear testimony.'" Crawford v. Washington, 541 U.S. 36, 51, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (citation omitted). In general, it also bars admission of testimonial statements of an absent witness. Id. at 59. Whether the admission of statements violate a defendant's confrontation rights is a constitutional question reviewed de novo. State v. Price, 158 Wn.2d 630, 638-39, 146 P.3d 1183 (2006).

Here, testimonial statements from the absent informant were admitted. Because this violated Nord's right of confrontation and the

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[9] Under the Sixth Amendment, the accused has the "right . . . to be confronted with the witnesses against him." U.S. Const. amend. 6.

[10] Article 1, section 22 provides that in "criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face . . ." Const. art. 1, § 22.

State cannot meet its burden to prove the error harmless beyond a reasonable doubt, this Court should reverse.

a. The informant's statements were testimonial.

Absent unavailability and a prior opportunity for cross-examination, testimonial statements from an absent witness may not be admitted. Crawford, 541 U.S. at 59. Included among the "core class" of testimonial statements are (1) statements that a declarant would reasonably expect to be used prosecutorially and (2) statements made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Id. at 51-52. In general, statements by informants are testimonial in character. United States v. Cromer, 389 F.3d 662, 675 (6th Cir. 2004).

When a statement is not made to law enforcement, the standard is "whether a reasonable person in the declarant's position would anticipate his or her statement being used against the accused in investigating and prosecuting the alleged crime." State v. Shafer, 156 Wn.2d 381, 390 n.8, 128 P.3d 87 (2006); State v. Beadle, 173 Wn.2d 97, 109, 265 P.3d 863 (2011) (standard applies when statement is made to a nongovernmental witness). When a statement is made in the context of police interrogation, the "primary purpose" test applies:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006); Beadle, 173 Wn.2d at 108 (primary purpose test applies to statements made during police interrogation).

Officer Medlen testified to the contents of the informant's telephone conversation with Nord. RP 182. He testified that, "Mr. Cave was explaining to Mr. Nord he wanted to buy a quarter ounce of methamphetamine, wanted to hook up with him, which is a common term for meet for the exchange." RP 183. According to Medlen, Nord said he was out of town, that he was picking up something, and that he would be back in town in a few hours. RP 183. Medlen then testified that Cave asked to meet Nord in public, but ultimately agreed to meet at Cave's residence. See RP 183.

Here, Cave, a government informant, made statements to Nord rather than to the police. Thus, the declarant centered Shaffer standard applies. The statements are testimonial because a reasonable person in Cave's position would expect that his statements would be used in

prosecuting Nord. Cave was acting on behalf of law enforcement and made the statements in the presence of a police detective. The point of the operation was to gather evidence for a prosecution against Nord. As part of Cave's "contract" with police, Cave understood that he could be called to court to testify. RP 209. Under these facts, a reasonable person in Cave's position would expect that his statements to Nord, about requesting to buy a quarter ounce of methamphetamine, would be used at trial. Thus, the informant's statements meet the "core class" definitions of testimonial established in Crawford.

b. The admission of the testimonial statements had practical and identifiable consequences, making the constitutional violation manifest error.

Nord did not argue that the admission of the informant's statements violated his right of confrontation. Nevertheless, this Court should review the issue because the violation of Nord's confrontation rights qualifies as "a manifest error affecting a constitutional right." RAP 2.5(a)(3). A showing of actual prejudice makes an error manifest. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Actual prejudice is established when the error had "practical and identifiable consequences." Id.

Here, the testimonial statements from Cave should have been excluded. The statements from Cave asking to buy a quarter ounce of

methamphetamine were crucial evidence in prosecuting Nord for delivery. As explained in greater detail below on why the error was prejudicial, the State used this evidence repeatedly to argue that Nord was guilty of delivery and to obtain an accomplice liability instruction. There was no similar evidence. Accordingly, because the error had identifiable and practical consequences, the claim qualifies as manifest error affecting a constitutional right that this Court should review despite lack of an objection below. State v. Kronich, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007) (reviewing confrontation clause challenge for first time on appeal as manifest constitutional error under RAP 2.5) overruled on other grounds by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012).

c. The State cannot meet its burden to prove that the constitutional error was harmless beyond a reasonable doubt.

If a court determines a claim raises a manifest constitutional error, it may still be subject to a harmless error analysis. O'Hara, 167 Wn.2d at 98. Confrontation right violations are subject to harmless error analysis. State v. Jasper, 174 Wn.2d 96, 117, 271 P.3d 876 (2012). Constitutional error is presumed to be prejudicial, and the State bears the burden of proving that the error was harmless. Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967); State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). The State must show beyond a reasonable

doubt that the error complained of did not contribute to the finding of guilt. Jasper, 174 Wn.2d at 117. Because the evidence of delivery was weak and the State's accomplice liability theory was based on the erroneously admitted testimonial statements from Cave, the State cannot meet its burden to prove the error was harmless.

No witness testified about what happened in Cave's residence. No witness testified that Nord entered Cave's home. Although the State might have called Cave to testify about how he obtained the methamphetamine, the State did not call him as a witness. Nor did the State call as witnesses either of the two passengers in the Honda, who might have had pertinent knowledge of what happened. The testimony only established that the Honda entered Cave's driveway and that it later exited the driveway. RP 166-67, 179, 185-88, 210, 216. Police officers did not see who went into the home and did not see into the home. See RP 166-67, 179, 185-88, 210, 216.

Without Cave's testimonial statement that he wanted to buy a quarter ounce of methamphetamine from Nord, the evidence would not have established that Nord met Cave to facilitate a drug transaction. And without the statement, the amount of methamphetamine Cave handed over to Officer Medlen, a quarter ounce, would have not linked Nord to the

delivery. The statement showed that Cave had received the same amount of methamphetamine that he had requested on the phone.

The testimonial statements were also used, over Nord's objection, to justify an accomplice liability instruction on the delivery charge. RP 262-64; CP 34, 38. Nord's complicity was premised primarily on the hearsay evidence from Cave. RP 263. The State used the accomplice liability instruction to argue that while it was unknown who physically delivered the methamphetamine to Cave, it did not matter because Nord was an accomplice by setting up the "deal":

> So, we may not know who actually did the physical delivery of the methamphetamine to Mr. Cave, but we do know or it doesn't matter, because Mr. – we do know Mr. Nord is that person's accomplice, whether he actually handed it to Mr. Cave, he is their accomplice. He set up the deal. He agreed and aided in the performance of the commission of that crime.

RP 277; see also CP 34 (telling jury Nord was guilty if Nord or an accomplice delivered a controlled substance). Absent this evidence, the State would not have been able to obtain an accomplice liability instruction. See In re Welfare of Wilson, 91 Wn.2d 487, 588 P.2d 1161 (1979) (merely being at scene of a crime is insufficient to make one an accomplice to a crime). The State certainly would not have been able to argue that the phone conversation established accomplice liability.

The State will likely argue that any error was harmless in light of a jail call recording admitted at trial. Ex. 15.[11] But this evidence actually illustrates the weakness of the State's case. In the recording, Nord states that he had some interaction with a person named Brad (which could be a reference to Brad Cave) and uses the terms "color," "clear," and "yellow." Ex. 15. The State's interpretation of the recording was that there were references to drugs and that Nord essentially confessed to delivering a controlled substance to Cave. But Nord did not confess to any charges. In fact, he referred to the charges as "trumped up" on the recording. Ex. 15. The prosecutor played the recording twice for the jury (once when it was admitted and again during closing) and the jury listened to it two more times while deliberating. RP 240, 318, 330. The jury spent nearly a full day deliberating after the case was submitted to it the day before. See Supp. CP __; sub. no. 32. If this recording or any other evidence were so definitive, then the jury would not have needed to listen to the recording multiple times and would have not spent nearly a full day deliberating after being instructed the previous afternoon.

[11] The full call was not played for the jury. RP 324-331. The portion played for jury begins at 9 minutes and 30 seconds into the call. Ex. 15. The Court should disregard the earlier part.

The statements were crucial evidence in establishing that Nord was guilty of delivery of a controlled substance. No other evidence established what Cave's testimonial statements established. Further, the error was compounded by the prosecutor's repeated arguments referring to that evidence. Because the State cannot meet its burden to prove the error harmless beyond a reasonable doubt, this Court should reverse the delivery conviction and remand for a new trial.

2. Alternatively, admission of hearsay from the informant was prejudicial error.

Alternatively, this Court should reverse because the testimonial statements were also inadmissible hearsay that prejudiced Nord. While Nord did not object on confrontation right grounds, he did object on hearsay grounds. RP 182-183. Over Nord's objection, the court allowed Officer Medlen to testify to the content of statements that the informant, Cave, made to Nord over the phone. Because the statements were inadmissible hearsay and were crucial in the State's effort to prove delivery of a controlled substance, the court committed prejudicial error.

a. The informant's statements were inadmissible hearsay.

Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted." ER 801(c). Absent an applicable rule or statute, hearsay is inadmissible. ER 802. Whether or not the statement is hearsay

is a question of law reviewed de novo. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006).

The State asked Officer Medlen to testify to the contents of the informant's telephone conversation with Nord. RP 182. Nord objected. RP 182. The prosecutor argued that the statements were not offered for the truth of the matter asserted, although for what other relevant purpose was unclear:

> No. The truth of the matter is irrelevant. It's not offered for the truth of the matter asserted because they are setting up a dope deal and no word on operative on their own - - it's not offered for the truth.

RP 182-83. Nord argued that the statements were "absolutely offered for the truth." RP 183. The court overruled the objection, but provided no rationale, so it is not clear on what grounds the statements were admitted. RP 183.

After the court ruled, Officer Medlen testified that, "Mr. Cave was explaining to Mr. Nord he wanted to buy a quarter ounce of methamphetamine, wanted to hook up with him, which is a common term for meet for the exchange." RP 183. Medlen then testified that Cave agreed to meet at Cave's residence. See RP 183.

Contrary to the State's argument, the informant's out-of-court statements were offered to prove the truth of the matter asserted, i.e., that

the informant wanted to meet to purchase a quarter ounce of methamphetamine–"a dope deal." RP 183. This was hearsay. See Edwards, 131 Wn. App. at 614-15 (informant's statement to officer that a person named Olin was dealing cocaine inadmissible hearsay); State v. Johnson, 61 Wn. App. 539, 546-47, 811 P.2d 687 (1991) (officer's testimony that he had reason to suspect the defendant was involved in drug trafficking inadmissible hearsay).

The record resolves any doubts on whether the statements were hearsay. During closing argument, the State repeatedly argued that the evidence showing that Nord set up a drug deal over the phone and that this tended to prove he was guilty of delivery. RP 274 ("we know that a drug deal was set up by telephone"); RP 274-75 ("Detective Medlen . . . listened in on that telephone call where they set up a deal for a quarter ounce of methamphetamine"); RP 276 ("we know Mr. Nord set up the deal."); RP 277 "[Nord] set up the deal."); RP 280 ("[Nord] set up a deal for a quarter ounce himself over the phone."); RP 317 ("we do know that [Nord] set up the drug deal."). The State's arguments referring to a drug deal being set up only makes sense if the informant's statements were considered for their truth.

The State also drew the jury's attention to the evidence that the amount of methamphetamine received from Cave, a quarter ounce,[12] was the same amount that Cave had inquired about on the phone:

> He set up a deal for a quarter ounce himself over the phone. Gee, what a coincidence and the quarter ounce was delivered, yes, yes, yes.

RP 280. This proves that the hearsay was used to establish the truth of the matter asserted–that Cave wanted to meet and buy a quarter ounce of methamphetamine. Otherwise, the prosecutor would have not been able to argue that the amount of methamphetamine received from Cave was the same amount Cave had sought on the phone with Nord. The statements were plainly used for their truth.

b. Admission of the hearsay was prejudicial.

An evidentiary error is prejudicial if, within reasonable probabilities, the outcome of the trial would have been different. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). For the same reasons argued earlier on why the testimonial statements were not harmless error under the constitutional error standard, the error was not harmless. The admission of the hearsay was sufficiently prejudicial under the lesser

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[12] Medlen testified that the amount of drugs received from Cave was the same amount that Cave had asked for on the phone. RP 217.

harmless error standard to justify reversal. See Edwards, 131 Wn. App. at 615-16 (error in admitting hearsay not harmless).

3. The allegation of attempting to elude a police vehicle in the charging document omitted the essential element that the defendant acted "willfully" in failing to stop, requiring reversal of the conviction.

In the charge for attempting to elude a police vehicle, the information did not allege that Nord "willfully" failed to stop. Because this is an essential element and it cannot be fairly implied from the document, this Court should reverse the eluding conviction.

To commit the offense of attempting to elude, the driver must act "willfully":

> (1) Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony. The signal given by the police officer may be by hand, voice, emergency light, or siren. The officer giving such a signal shall be in uniform and the vehicle shall be equipped with lights and sirens.

RCW 46.61.024 (emphasis added). Thus, that the defendant must have acted willfully in failing to stop is an essential element of the offense. See State v. Tandecki, 153 Wn.2d 842, 848, 109 P.3d 398 (2005); State v. Flora, 160 Wn. App. 549, 552, 249 P.3d 188 (2011). Despite amending the information twice to correct other problems with the language

charging attempting to elude, all three charging documents, including the last one, omitted the mens rea element of "willfully." CP 5, 10, 14. The last charging document read:

> ATTEPTING TO ELUDE A PURSUING POLICE VEHICLE, COUNT III
> That on or about the 10th day of April, 2013, the said defendant, ALAN JOHN NORD, then and there being in said county and state, did fail to immediately bring his vehicle to a stop after a uniformed office [sic] driving an appropriately marked police vehicle, equipped with emergency lights and siren, gave a visual or audible signal to bring his vehicle to a stop and did drive his vehicle in a reckless manner while attempting to elude a pursuing police vehicle, in violation of RCW 46.61.024, which violation is a Class C Felony and during the commission of this offense did endanger one or more persons for the purposes of RCW 9.94A.533(11).

CP 15.

To afford notice to a defendant of the nature and cause of the accusation, the State must include all the essential elements of the crime in the charging document. State v. Kjorsvik, 117 Wn.2d 93, 97, 812 P.2d 86 (1991); Const. art. 1, § 22; U.S. Const. amend. 6. When hearing a challenge to the sufficiency of the information for the first time on appeal, the court liberally construes the document, and analyzes whether "the necessary facts appear in any form, or by fair construction can they be found, in the charging document?" Kjorsvik, 117 Wn.2d at 105. If the court does not find the missing element, prejudice is presumed and

reversal is required. State v. McCarty, 140 Wn.2d 420, 425-26, 998 P.2d 296 (2000). If the element is found, the court analyzes whether the defendant was actually prejudiced by the "inartful language." Kjorsvik, 117 Wn.2d at 106; McCarty, 140 Wn.2d at 425.

The mens rea element of "willfully," which modifies the word "failed," cannot be fairly found or implied from the charging document. Its absence meant that Nord was improperly informed he could be found guilty for simply not stopping after police signaled him to stop. It also incorrectly told him that the State did not have to prove that he knew was being pursued by a police vehicle. See Flora, 160 Wn. App. at 555. No other language fulfilled these purposes.

This Court reversed an eluding conviction for a defective information in State v. Naillieux, 158 Wn. App. 630, 241 P.3d 1280 (2010). There, the information used language from a prior version of the statute and thus failed to allege the reckless manner element and the lights and sirens element. Naillieux, 158 Wn. App. at 644-45. The reckless manner element had replaced a "willful and wanton" standard. Id. at 644. Concerning the reckless manner element, the court held it could not infer "reckless" from "willful and wanton." Id. The court further rejected the State's argument that citation in the information to the statute cured the problem. Id. at 645.

Consistent with Naillieux, this Court should hold that failure to allege that Nord acted "willfully" requires reversal. The conviction should be dismissed without prejudice to refile. McCarty, 140 Wn.2d at 428.

Based on the eluding conviction, the court also ordered $2,835.20 in restitution for "Vehicle Repair." CP 78. Accordingly, reversal of the eluding conviction requires vacation of the restitution order. See State v. Osborne, 140 Wn. App. 38, 41-42, 163 P.3d 799 (2007) (court may not require restitution beyond the crime charged unless the defendant expressly agrees to pay restitution for crimes that he was not convicted of).

4. The court erred in not giving the defendant's requested unwitting possession instruction, requiring reversal of the possession conviction.

The trial court denied Nord's request for an unwitting possession instruction. Because the evidence, when viewed in the light most favorable to Nord, permitted the instruction, the court erred. Accordingly, if not vacated on double jeopardy grounds (see argument below), this Court should reverse the possession conviction for this separate reason.

A trial court must instruct on a party's theory of the case if the law and evidence support it; the failure to do so is reversible error. State v. Otis, 151 Wn. App. 572, 578, 213 P.3d 613 (2009). A defendant raising an affirmative defense must offer sufficient admissible evidence to justify

giving an instruction on the defense. Id. In evaluating whether the evidence is sufficient to support such an instruction, the trial court must interpret the evidence most strongly in favor of the defendant. Id.
A trial court's refusal to give instructions to a jury, if based on a factual dispute, is reviewable for abuse of discretion while the trial court's refusal to give an instruction based upon a ruling of law is reviewed de novo. State v. Walker, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998).

Unwitting possession is a judicially created affirmative defense that may excuse violation of the offense of possession of a controlled substance. State v. Buford, 93 Wn. App. 149, 151–52, 967 P.2d 548 (1998). The defense ameliorates the harshness of the strict liability crime of possession of a controlled substance. State v. Bradshaw, 152 Wn.2d 528, 533, 98 P.3d 1190 (2004). A defendant is entitled to the instruction if the evidence presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant unwittingly possessed the contraband. Buford, 93 Wn. App. at 153. When deciding whether to give an instruction, a trial court must consider all of the evidence presented, regardless of which party presented it. State v. Olinger, 130 Wn. App. 22, 26, 121 P.3d 724 (2005).

The State argued against giving the unwitting possession instruction, noting it was an affirmative defense and that the defendant

could not meet that affirmative defense because he had not presented evidence or testified. RP 252, 257. Nord argued that he did not have to present evidence and that the evidence entitled him to the instruction. RP 257-58. Noting that it had reviewed some unspecified cases, the court denied the request. RP 258

While Nord did not testify or present any evidence in support of his request for the unwitting possession instruction, the facts and evidence presented by the State, interpreted most strongly in favor of Nord, were sufficient to warrant the instruction. The drugs were found on the floor of the Honda. There was no evidence that Nord owned the Honda. There were two other adult passengers in the car with him. While the substance was found on the driver's side, it is common for items to slide around on the floors of cars. Under these facts, this Court should hold that the evidence here was sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that Nord unwittingly possessed methamphetamine. Thus, the trial court erred in failing to give an unwitting possession jury instruction. This Court should reverse the possession conviction. Otis, 151 Wn. App. at 582.

5. Flagrant and ill-intentioned prosecutorial misconduct deprived the defendant of his right to a fair trial.

The right to a fair trial is a fundamental liberty secured by the

United States Constitution and the Washington State Constitution. In re Pers. Restraint of Glasmann, 175 Wn.2d 696, 703, 286 P.3d 673 (2012); U.S. Const. amend. 14; Const. art. 1, § 3. Prosecutorial misconduct may deprive defendants of their constitutional right to a fair trial. Glasmann, 175 Wn.2d at 703-04. When a defendant shows that the prosecutor's conduct was improper and prejudicial, the appellate court should reverse. See id. at 704. Prejudice requires that the defendant show a substantial likelihood that the misconduct affected the jury verdict. Id. Flagrant and ill-intentioned misconduct excuses the lack of an objection (as true here) when an instruction would not have cured the resulting prejudice. Id.

During closing argument, the prosecutor argued that the actions of the police officer who pushed the car driven by Nord off the road as "selfless" and "heroic," and that the jury should send the proper message to law enforcement through its guilty verdict:

> Why didn't [the Deputy] just stop trying to pull [Nord] over and [the Deputy] goes because he was so dangerous going out in the roadway, I had to. Whether or not I was afraid or not of what he was going to do, I had to try to stop him and the State submits that's the kind of selfless and heroic, if you will, action. We admire and respect in our law enforcement officers and we are so glad they are willing to do and perform on a daily based [sic] to protect us.
>
> Don't tell the deputy. Don't tell him that it was just like - - it's no big deal.

RP 291. In contrast to the "heroic" law enforcement, the prosecutor earlier referred to Nord as a "madman." RP 280.

These arguments were "nothing but an appeal to the jury's passion and prejudice." State v. Claflin, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984). It implied that Nord was a mad villain who had to be stopped by the "heroic" police. See State v. Belgarde, 110 Wn.2d 504, 506, 755 P.2d 174 (1988) (improper to refer to defendant as member of a group of madmen). It implied that acquittal would denigrate the police. See State v. Casteneda-Perez, 61 Wn. App. 354, 360, 810 P.2d 74 (1991) (improper tactic by prosecutor to create a false choice of finding defendant guilty or finding police officers were lying). It vouched for the State's witnesses, who were mostly law enforcement officers. State v. Sargent, 40 Wn. App. 340, 343-44, 698 P.2d 598 (1985) (vouching is improper). And it misrepresented the jury's role and its burden of proof. See State v. Fleming, 83 Wn. App. 209, 213-14, 921 P.2d 1076 (1996). While Nord did not object, these remarks were indelible and would not have been cured by any instruction. Sargent, 40 Wn. App. at 345; see also Krulewitch v. United States, 336 U.S. 440, 453, 69 S. Ct. 716, 93 L. Ed. 790 (1949) (Jackson, J., concurring) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.") (citation omitted).

Because there is a substantial likelihood that the misconduct affected the findings of guilt and deprived Nord of a fair trial, this Court should reverse the convictions.

6. The convictions for delivery of a controlled substance and possession of a controlled substance violates the prohibition against double jeopardy, requiring vacation of the possession conviction.

The jury found Nord guilty of both delivery of methamphetamine and possession of methamphetamine. Because these convictions may rest on the same evidence and the jury was not instructed that the two crimes had to be based on separate and distinct acts, the possession conviction violates double jeopardy and should be vacated.

Under the Washington and federal constitutions, double jeopardy prohibits multiple punishments for the same offense. State v. Kier, 164 Wn.2d 798, 803, 194 P.3d 212 (2008); Const. art. 1, § 9; U.S. Const. amend. 5. Under the "same elements" or Blockburger[13] test, the court examines whether two offenses are the same in fact and the same in law. Kier, 164 Wn.2d at 804. The elements of the crimes are to be viewed "as charged and proved, not merely as the level of an abstract articulation of the elements." State v. Freeman, 153 Wn.2d 765, 777, 108 P.3d 753

[13] Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932).

(2005). Double jeopardy is violated "where the evidence required to support a conviction upon one of the charged crimes would have been sufficient to warrant a conviction upon the other." In re Pers. Restraint of Orange, 152 Wn.2d 795, 820, 100 P.3d 291 (2004) (internal citations and quotations omitted). If the information, instructions, testimony, and argument do not clearly demonstrate that the State was not seeking to impose multiple punishments for the same offense, then there is a double jeopardy violation. State v. Mutch, 171 Wn.2d 646, 664, 254 P.3d 803 (2011). This Court's review is de novo. Id. at 662.

It is impossible to deliver a controlled substance without possessing it beforehand. Thus, possession of methamphetamine is the same in law as delivery of methamphetamine under the same elements test. See State v. Rodriguez, 48 Wn. App. 815, 816-17, 740 P.2d 904 (1987) (possession of marijuana with intent to deliver is a lesser included offense of delivery of marijuana); State v. Rapp, 25 Wn. App. 63, 65, 604 P.2d 534 (1979).

The record shows that the possession conviction is potentially based on the same facts as the delivery. The charging document alleged the same time period for the two offenses. CP 14 ("on or about the 10th day of April, 2013,"). It did not allege two separate and distinct acts. CP 14. The jury instructions similarly did not require the jury to base a guilty

finding for possession on an act separate and distinct from the delivery. Compare CP 34 (stating that to find Nord guilty of delivery, the jury must find: "That on or about the 10th day of April, 2013, the defendant or his accomplice delivered a controlled substance) with CP 40 (stating that to find Nord guilty of possession, the jury must find: "That on or about the 10th day of April, 2013, the defendant possessed a controlled substance."). No instruction required the jury to base their verdicts on distinct acts. Under the instructions, the jury may have found that Nord was guilty of possession based on the evidence of delivery.

When there is evidence of two instances in which the jury could have found possession, one of which would violate a defendant's right to be free from double jeopardy, the trial court should instruct the jury in a way to distinguish the two instances. State v. Garcia, 65 Wn. App. 681, 691, 829 P.2d 241 (1992); see also State v. Land, 172 Wn. App. 593, 603, 295 P.3d 782 (2013). In Garcia, this Court reversed a conviction for possession with intent to deliver where the defendant was also convicted of delivery. Garcia, 65 Wn. App. at 691. There was evidence that the possession with intent to deliver charge was based on conduct that occurred after the alleged delivery. Id. at 683. The instructions, however, did not distinguish between the two instances. Id. 684-85. During deliberations, the jury asked whether the intent to delivery was as to the

person to whom the drugs had been delivered. Id. at 685. In light of the instructions and the inquiry from the jury, this Court reversed the conviction because the lack of a clarifying instruction meant the conviction possibly violated the prohibition against double jeopardy. Id. 691.

Garcia was distinguished in State v. Carter, 74 Wn. App. 320, 333, 875 P.2d 1 (1994), aff'd, 127 Wn.2d 836, 904 P.2d 290 (1995). There, the defendant argued that his conviction for possession with intent to deliver should be reversed under Garcia. This Court rejected her argument because, while the instructions did not distinguish between the two instances, the prosecutor distinguished between the two charges and argued that the charge for possession with intent to deliver was based on acts occurring after the delivery. Carter, 74 Wn. App. 333-34. There was also no evidence of jury confusion. See id.

This case is more like Garcia than Carter. While the prosecutor argued that the possession charge was premised on the methamphetamine found in the car, this case is distinct from Carter. During deliberations, the jury asked the court for further instruction on the meaning of "dominion and control":

> Please define the meaning of 'dominion and control' and what is meant by the phrase 'dominion and control need not be exclusive' in the context of Instruction No. 15.

CP 55; RP 322. This shows that the jury likely struggled in determining whether Nord constructively possessed the methamphetamine in the car. To resolve that struggle, the jury may have rested its verdict for delivery and possession on the same facts. Under the court's instructions, this was not forbidden. See CP 40. Thus, unlike in Carter, this Court cannot be confident that the possession conviction does not violate double jeopardy. Because it was not manifestly apparent to the jury that the State was not seeking to convict Nord of possession based on the act of delivery, the possession conviction violates double jeopardy, requiring its vacation. See Mutch, 171 Wn.2d at 664; Land, 172 Wn. App. at 602.

7. Reversal of the eluding conviction requires resentencing on the delivery of a controlled substance conviction and vacation of the restitution order.

If the Court reverses the eluding conviction, but not the conviction for delivery, remand for resentencing is necessary regardless of the defendant's offender score because the court justified a top-end sentence of 120 months for delivery based on the facts from the eluding conviction.

Because Nord's offender score was greater than six and the seriousness level of the delivery conviction was level two, the standard sentencing range was 60 to 120 months. CP 71; RCW 9.94A.517. Nord argued that a sentence of 90 months was appropriate. RP 338. The

prosecutor argued that the facts from the eluding conviction and Nord's offender score justified a top-end standard range sentence of 120 months for the delivery. RP 334-35. The court accepted the State's argument and noted that facts related to the eluding especially justified a 120 month sentence for the delivery conviction. RP 343-44.

If Nord had not been convicted or charged of eluding, using facts from the eluding would have been improper. The Sentencing Reform Act structures sentencing decisions to consider only the actual crime of which the defendant has been convicted, his or her criminal history, and the circumstances surrounding the crime. State v. Houf, 120 Wn.2d 327, 333, 841 P.2d 42 (1992). Thus, in determining a standard range sentence, "the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537." RCW 9.94A.530(2). This is the "real facts doctrine." The "real facts" doctrine excludes consideration of uncharged crimes or of charged crimes that were later dismissed. State v. Barnes, 117 Wn.2d 701, 707, 818 P.2d 1088 (1991).

Had Nord not been charged or convicted of eluding, the court could have not used facts from the eluding to justify its sentence on delivery. See id. at 707. Logically, it follows that the top-end sentence for

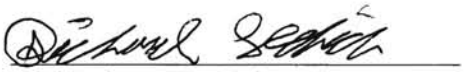
delivery of a controlled substance cannot stand if the eluding conviction is reversed. Thus, if this Court reverses the eluding conviction but not the delivery conviction, remand with instruction for a new sentencing hearing is necessary because absent the eluding conviction, the court likely would have not sentenced Nord to 10 years for delivery a controlled substance.

F. CONCLUSION

The State's key witness, an informant, was absent from the trial. Nevertheless, the court allowed a police officer to serve as a conduit for statements the informant allegedly made to Nord. These prejudicial statements were used as for their truth and as substantive evidence in proving Nord guilty of delivery of a controlled substance. Their admission violated the rules of evidence and the confrontation clauses of the federal and state constitutions. This Court should reverse the delivery conviction. The other convictions should be reversed for the reasons detailed above.

DATED this 21st day of April, 2014.

Respectfully submitted,



Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 70806-6-I
	)	
ALAN NORD,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 21ST DAY OF APRIL, 2014, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X]	ALAN NORD 883130 CLALLAM BAY CORRECTIONS CENTER 1830 EAGLE CREST WAY CLALLAM BAY, WA 98326	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 21ST DAY OF APRIL, 2014.

X_____

Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
Seattle, Washington 98101
☎(206) 587-2711