COA No. 35000-2-III

NO. 96701-6
IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

DELBERT BENSON, Petitioner.

PETITION FOR REVIEW

STATE'S ANSWER

Respectfully submitted:

by: Teresa Chen, WSBA 31762
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I. IDENTITY OF RESPONDENT

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

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial, conviction, and sentence of the Petitioner.

III. ISSUES

1. Is there sufficient evidence for the perjury conviction where the two detectives testified to their observations which were corroborated by audio recordings of the controlled buy and the Defendant's sworn debriefing statement? Does the Unpublished Opinion's application of established law present any consideration under RAP 13.4(b)?
2. Is there any error in the to-convict instruction which, consistent with the WPIC, does not treat the legal sufficiency test as an element and does not incorporate gratuitous "to wit" language where only a single act was discussed at trial? Does this challenge to the WPIC present any consideration under RAP 13.4(b)?

3. Does the prosecutor's closing argument, explaining the limited conduct which the state alleged to be the crime, dilute or even address the burden of proof? Does the Defendant's misrepresentation of the argument present a consideration under RAP 13.4(b)?

4. Did the Court of Appeals err in denying the Defendant's "Motion for Reconsideration" which did not address a matter previously raised, but rather sought to make a new claim of error after the opinion had issued?

IV. STATEMENT OF THE CASE

The Defendant Delbert Benson has been convicted of perjury in the first degree for his testimony in the trial of John Gant. CP 189, 193, 204-05.

In 2012, facing charges in Columbia and Garfield counties, the Defendant approached police about working as a criminal informant (CI). RP 113-14, 136-41, 164-65, 178-79. Within five days of entering into a CI contract, the Defendant engaged in controlled buy of Mr. Gant. RP 136-41, 148-49, 163-65, 178-79.

A couple months later, the Defendant was found in possession

of methamphetamine and charged with a new offense. RP 188. Having failed to satisfy the contract,[1] the Defendant did not receive any consideration for his work as an informant. RP 187-90, 274. He then provided false testimony at Mr. Gant's trial, claiming that he had purchased drugs from someone else and hidden the drugs in the toolbox of his truck before meeting with police at the beginning of the controlled buy. RP 185-86, 191-92. Mr. Gant was acquitted. RP 302. And the Defendant was charged with perjury. CP 4-5, 122-23.

At the Defendant's perjury trial, Detectives Bolster and Harris provided direct testimony that the Defendant had been under constant surveillance[2] throughout the controlled buy. RP 135-36, 148-49, 152, 240-41, 295-96. They had thoroughly searched the Defendant and his truck immediately before and after the controlled buy. RP 134-35, 148-49, 265-66, 292, 294, 300. The Defendant had made a recorded debriefing statement under penalty of perjury describing the controlled buy. RP 154, 157-58, 166, 213. The wire recording also captured the

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[1] The record cited by the Petitioner (Petition at 4, citing RP 164, 189-90, 261) does not support an interpretation Mr. Benson "refused" to participate in further controlled buys or that this was the basis for the conclusion of the contract.

[2] The Defendant states that the officers could not hear all the conversation in Mr. Gant's residence. Petition at 4 (citing RP 151). While the surveilling officers experienced some static over the radio, the actual recording on the SD card was clear. RP 150-51, 298.

sale. PE 3; RPE (transcript of exhibit); RP 157, 159-63.

The Defendant was convicted as charged and appealed. CP 189, 193, 204-05.

In the Appellant's Brief, the Defendant alleged errors at trial, but did not challenge any portion of the sentence. After the Court of Appeals issued its decision and the State filed a cost bill, the Defendant filed a "Motion for Reconsideration" which did not challenge any portion of the unpublished decision but asserted for the first time that he lacked the ability to pay LFOs.

The Court of Appeals was apprised of the record supporting the Defendant's ability to pay.

> Mr. Benson filed numerous letters of support from employers and family indicating that he was educated, skilled, employed, and employable as well as married to a medical professional. See attached. Those letters show that he attended Walla Walla College and was a marine for ten years. He has certifications in welding, building maintenance, and horticulture.
>
> His wife was also a marine as well as a prison guard. She is now a licensed dental hygienist taking additional training in anesthesia and employed at the VA as an advanced medical support assistant. Mrs. Benson wrote that her husband recently obtained a full time job as the sole employee at Kent Land Company where he:
>
> > has to do all the mechanic work, welding, and maintain the tractor [...] Operate the tractor and all the different implements to complete the wheat farming. Along with all his farm

> duties Del is also in charge of trimming trees and the up keep at each of Jim Kent's properties.
>
> His various former employers wrote letters of support. Ms. Duncan wrote that the Defendant "worked for me" and that she "truly believe[s] Delbert will return to his job." Mr. Allen wrote that Mr. Benson worked for him installing siding and refurbishing a camp trailer and is eager to work. Mr. Young has known Mr. Benson for 25 years and believes he "has the ability to find a good job in several different fields like Gas or Diesel engines repair, Truck Driving, or General Equipment repair."

State's Memorandum Re. Cost Bill at 2-3. The court denied the motion.

V. ARGUMENT

A. THE PETITION DOES NOT MEET THE RAP 13.4(B) STANDARD FOR ACCEPTING DISCRETIONARY REVIEW.

This Court will only accept review if a consideration under RAP 13.4(b) is present. The Defendant's summary claim without further discussion of the standard does not command this Court's attention. Petition at 17-18. The Defendant does not allege that the denial of the Motion for Reconsideration presents any consideration under RAP 13.4(b). Petition at 18-20. It does not.

B. SUFFICIENT EVIDENCE SUPPORTS THE CONVICTION.

The Defendant essentially challenges the sufficiency of the evidence for his conviction. He argues that the only way the State

can meet its burden is by providing testimony "from a person who saw an alleged drug purchase." Petition at 9. No authority which the Defendant has cited suggests that this is the standard. It is not.

There is a heightened proof standard for perjury, which requires the State provide at least one credible witness in a position to know the Defendant's sworn facts to be false who can provide direct testimony that is positive and directly contradictory of the Defendant's oath. *State v. Singh*, 167 Wn. App. 971, 976, 275 P.3d 1156 (2012); *State v. Rutledge,* 37 Wash. 523, 527, 79 P. 1123 (1905). Direct testimony does not require that a witness have been present at events; it is enough that the witness observed information on a recording. *State v. Singh*, 167 Wn. App. at 977 (citing *Domingo v. Boeing Employees' Credit Union,* 124 Wn.App. 71, 79–80, 98 P.3d 1222 (2004) and *United States v. Begay,* 42 F.3d 486, 502–03 (9th Cir.1994)). Witnesses may testify about information they viewed on videotape or heard on audio recording. *State v. Singh*, 167 Wn. App. at 977.

> [The purposes behind the heightened proof requirements for perjury are satisfied when the evidence of the knowingly false statement is recorded prior to the hearing at which the perjury is subsequently committed. In such circumstance, the recorded

> evidence can both provide a basis for the witness's testimony and corroborate that testimony.

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

Law enforcement officers provided the direct evidence which was corroborated by the Defendant's previous statement and audio recordings. Unpub. Op. at 7-8.

The Defendant argues that the State needed to have flipped criminal conspirators to have made its case. No authority would suggest that a criminal informant who is physically inside a room but perhaps intoxicated or not paying attention is a better direct witness than a professional observer conducting surveillance by wire and binoculars.

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

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

There is sufficient evidence in the direct observations of the two detectives and the multiple exhibits (including transcripts and recordings) to support the conviction. The Unpublished Opinion does not conflict with any case law. Its application of established law does not present a significant constitutional question or issue of public interest.

C. THE COURT DID NOT ERR IN INSTRUCTING THE JURY CONSISTENT WITH THE WPIC.

The Defendant claims that the legal sufficiency test in WPIC 18.12 incorporated at Instruction No. 7 (CP 173) is an essential element and must be repeated in the to-convict jury instructions. Petition at 12. The Defendant offers no authority in support of this claim.

An element is a fact which must be proven to sustain a conviction, generally the actus reus, mens rea, and causation. *State v. Peterson*, 168 Wn.2d 763, 772, 230 P.3d 588 (2010). The legal sufficiency test does not provide any additional fact necessary to

define and prove a crime. Because a legal sufficiency standard is not an element, but a legal sufficiency standard, its proper place is outside of the to-convict instructions, as this Court has directed in the WPIC.

The superior court relied upon the to-convict instruction in WPIC 118.02. CP 177. The Comment to the WPIC further directs a trial court to use WPIC 118.12, 118.16, 118.17, and 10.02. These were employed. CP 173-76, 185.

The Defendant argues that WPIC 5.01 (regarding the equivalent weight of direct and circumstantial evidence) contradicts WPIC 118.12. Petition at 13. There is no contradiction in the instructions. One speaks to weight; the other to a legal sufficiency requirement for at least one direct witness.

The Defendant claims that the to-convict instruction should have contained the "to wit" language in the information. Petition at 14-15. He argues that, absent this specificity, the jury could convict on different conduct, because the Defendant made so many small, false statements at Mr. Gant's trial. Petition at 14. The jury was not confused. Only one act was alleged to be the crime. There is no requirement for such an instruction when only one act is alleged.

State v. Hanson, 59 Wn. App. 651, 656-57, 800 P.2d 1124, 1129 (1990)(if the evidence proves only one violation, then no *Petrich* instruction is required for a general verdict will necessarily reflect unanimous agreement that the one violation occurred).

Both attorneys made abundantly clear in their arguments what conduct was at issue. Unpub. Op. at 10 ("Any vagueness in the court's instruction was sufficiently addressed by the clarification presented by both counsel for the State and defense counsel"). *See* RP 117, 379, 381-82, 387-89, 402, 409.

The Unpublished Opinion does not conflict with any case law. Use of the WPIC does not present a significant constitutional question or issue of public interest.

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

The Defendant misrepresents that the prosecutor compared the burden of proof to a boat that either would or would not float. Petition at 16-17. The prosecutor was not speaking about the burden of proof. He was speaking about the allegation of perjury as being about a single false statement (where the drugs came from) and not the many little lies that peppered the Defendant's narrative. Petition

at 16.

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

RP 413.

While there were many details to puzzle through, the prosecutor did not want the jury to be confused about the essential facts (or conduct) for their consideration. RP 409. It was not essential that the jury decide whether the Defendant was telling the truth when he testified at Mr. Gant's trial that he was clean and sober versus when he testified at his own trial that he would have melted the urinalysis cup back then. RP 406-07. It was not crucial that the jury figure out why the methamphetamine that Mr. Gant represented to be 1.5 grams weighed slightly short at the state lab. RP 407. While it was interesting to consider what changed the night before Mr. Gant's trial to alter the Defendant's testimony, that also was not the issue. RP 408. Nor was it important who rode in the Defendant's vehicle on October 30, 2012. RP 409.

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

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

> Viewed in context, the prosecutor's analogy simply pointed out that the jury should focus on the false statement that formed the basis of the crime charged (the boat), not details regarding other false statements or wrongdoing (the various masts of the boat). While the prosecutor's analogy may not have been perfect, it did not undermine the fairness of Mr. Benson's trial. The trial court appropriately overruled Mr. Benson's objection to the prosecutor's argument.

Unpub. Op. at 10-11.

E. THE COURT OF APPEALS DID NOT ERR IN REFUSING TO CONSIDER A CLAIM RAISED FOR THE FIRST TIME AFTER THE COURT'S OPINION HAD ISSUED.

The Defendant did not assign error to the imposition of LFOs. The court rule requires an appellant to make a clear assignment of each and every error it contends the trial court made. RAP 10.3(a)(4).

Failure to assign error within the appellant's opening brief waives the claim. *Zabka v. Bank of America Corp.*, 131 Wn. App. 167, 174, 127 P.3d 722 (2005); *Sears v. Int'l Bhd. of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Local No. 524*, 8 Wn.2d 447, 457, 112 P.2d 850, 854 (1941) (where there is no assignment of error made to the matter in the appellant's brief, it is "not here for consideration"). *See also Calhoun v. State*, 146 Wn. App. 877, 890, 193 P.3d 188, 195 (2008), *as amended* (Oct. 28, 2008) (the court need not review issues that were neither addressed in the opening brief or reply).

It is well established that an appellant cannot bring a new assignment of error for the first time in reply. *State v. Tanzymore*, 54 Wn.2d 290, 293, 340 P.2d 178, 179 (1959) (refusing to consider a supplemental assignment of error raised in reply brief after a change of counsel); *King v. Rice*, 146 Wn.App. 662, 673, 191 P.3d 946 (2008) (argument raised for first time in reply brief comes too late); *Zabka, supra,* (a claim made for the first time in reply "will not be addressed"); *State v. Goodin,* 67 Wn.App. 623, 628, 838 P.2d 135 (1992), *review denied,* 121 Wn.2d 1019 (1993) (noting that the court generally will not consider arguments raised for first time in reply brief); *State v. Peerson,* 62 Wn.App. 755, 778, 816 P.2d 43

(1991), *review denied,* 118 Wn.2d 1012 (1992) (striking reply brief containing issues to which State had no opportunity to respond and holding that a reviewing court was not obliged to address errors raised for the first time in reply).

An exception may be made for the failure to assign error where "the nature of the appeal is clear and the relevant issues are argued in the body of the brief and citations are supplied so that the Court is not greatly inconvenienced and the respondent is not prejudiced, there is no compelling reason for the appellate court not to exercise its discretion to consider the merits of the case or issue." *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629, 633 (1995). That is not this case. The Defendant made no challenge to LFO's in his brief.

Because the issue was not raised to the court of appeals in the first instance, there was nothing to "reconsider." The court of appeals made no error in denying the motion. Its decision does not present a consideration under RAP 13.4(b).

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court deny the petition.

DATED: January 30, 2019.

Respectfully submitted:

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Nancy P. Collins nancy@washapp.org	A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED January 30, 2019, Pasco, WA **Original filed at the Court of Appeals, 500 N. Cedar Street, Spokane, WA 99201**

January 30, 2019 - 7:45 PM

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Superior Court Case Number:	15-1-00081-8

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