

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,)
Respondent,) No. 66143-4-I
Vs.) STATEMENT OF ADDITIONAL
MICHAEL R. SMITH,) GROUNDS FOR REVIEW
Appellant.)
_____)

2011 JUN 23 AM 10:27

FILED
COUNTY CLERK
STATE OF WASHINGTON
[Signature]

I, Michael R. Smith, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

1. ISSUES

- a. The appellant challenges the constitutional sufficiency of the charging document. All essential elements must be included in the charging document. This informs the defendant of the charges and allows him to present a defense.
- b. The appellant challenges the Trial Courts lack of notice of the date of August 20, 2009, due to the fabrication of that date for one of the alleged controlled buys, which prejudiced Mr. Smith in his ability to receive a fair trial.
- c. The essential elements of the Delivery of a Controlled Substance (Sept 4, 2009), were not met beyond a reasonable doubt by the State, and in the light most favorable to the State no trier of fact could have found the appellant guilty.

2. ARGUMENT

- a. APPELLANTS RIGHT TO THE STATE AND FEDERAL CONSTITUTIONS WERE VIOLATED WHEN THE ESSENTIAL ELEMENTS WERE NOT INCLUDED IN THE CHARGING DOCUMENT FOR THE CRIME CHARGED.

The appellant appeals the following conviction for Delivery of Heroin on August 28, 2009, and the fabricated date of August 20, 2009, in which the State alleges that

controlled buys from a CI were made. On August 20, 2009, the controlled buy was never made. (**RP Vol. I, Oct. 5, 2010, pgs. 58-62**). On August 28, 2009, the controlled buy, which wasn't on the charging information, was based upon evidence recovered after the target, Mr. Smith, was observed reaching over to the CI handing her something. (**See Longarm Case Reports, Dec. 16, 2009; Charging Information; and Affidavit for Probable Cause, Appendix A**). The Court did not advise me of the crime in its charging document. All essential elements of a crime, statutory or otherwise, must be included in a charging document in order to afford notice to an accused of the nature and cause of the accusation against him. This conclusion is based on Constitutional law and Court rule. **Const. art. 1 § 22, amend.10** provides in part:

In a criminal prosecution the accused shall have the right..... to demand the nature and cause of the accusation against him... **U.S. Const. Amend. 6**, provides in part: In all criminal prosecutions, the accused shall... be informed of the nature and cause of the accusation.....

CrR 2.1 (b), provides in part that the information shall be a plain concise and definite written statement of the essential facts constituting the offense charged. **State v. Kjorsvik, 117 Wn.2d 93, 102, 812 P.2d 86 (1991)**, states that all essential elements must be included in the charging document. This informs the defendant of the charges and allows him to present a defense. **Kjorsvik, 117 Wn.2d at 97**.

b. FABRICATED BUY.

August 20, 2009, fabricated controlled buy was based upon visual surveillance of Det. Laughlin, Sergeant Murphy, and the testimony of Det. Nelson. The State's theory is, a telephone call was made to a phone number; a price for a quantity of heroin and a

meeting place was discussed. The informant was followed to the meeting location where detectives testified, that a white male approached the CI, and the CI was unwilling to complete the deal. **(RP Vol. I, October 5, 2010, pgs. 14, 59; VRP October 5, 2010, pg. 74, Appendix B)**. The Date August 20, 2009 never appeared in the discovery; the necessary facts never appeared in any form, or by far construction can they be found in the charging documents, it was only brought up during trial. This prejudiced the appellant by the Lack of Notice, and did not allow Mr. Smith to prepare an adequate defense.

b. TELEPHONIC SEARCH WARRANT (Dates not accurate/fabricated)

Sergeant Claudia Murphy, while testifying under oath on the phone stated to the court concerning the dates of the controlled buys, *I am unsure of the date* where a phone call was made and arrangement was made to buy heroin and Mike ended up sending a runner and the confidential informant did not complete the purchase. **(See Appendix C)**.

This deal didn't happen and the state prejudiced the appellant by bringing up the fabricated controlled buy, only at trial, which was not in the charging document, which violates State and Federal Constitutions.

In closing arguments the Prosecution spoke about the fabricated buy, asking if Miss Crasper, the CI, manufactured that person. Did she come up with the voice on the phone? She's so crafty that she figured it all out and planned it all ahead of time? No. **(See Appendix D VRP, Oct. 6, 2010, pgs 159-160)**. But in the instant petition there is no way for the state to prove beyond a reasonable doubt that it was the appellant on the phone or the one that sent the alleged runner to make the controlled buy. There were neither audio recordings, nor video recordings of this alleged deal on this date. There

was just the credibility of the CI, Miss Crasper, who was looking at some time for Two (2) delivery charges that she was facing.

c. ESSENTIAL ELEMENTS OF THE CRIME CHARGED (Sept. 4, 2009), WERE NOT MET BY THE STATE.

The appellant's due process rights to the constitution were violated when the essential elements of the crime charged on the date above were not met by the State. The due process clause of the Fourteenth Amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the crime charged. **In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 25 L. Ed. 2d 368 (1970)**. Every crime consists of two components: (1) an actus reus and (2) a mens rea. **State v. Eaton, 168 Wn.2d 476, 480, 229 P.3d 704 (2010)**. The actus reus is "[t]he wrongful deed that comprises the physical components of the crime," while the "mens rea" is "[t]he state of mind that the prosecution...must prove that a defendant had when committing a crime." **Black's Law Dictionary 41, 1075 (9th Ed. 2009)**. Although the "legislature has the authority to create a crime without a mens rea element," **Eaton, 168 Wn.2d at 481 (quoting State v. Bradshaw, 152 Wn.2d 528, 532, 98 P.3d 1190 (2004))**, even such "strict liability" crimes require "a certain minimal mental element... in order to establish the actus reus itself," **State v. Utter, 4 Wn.App. 137, 139, 479 P.2d 946 (1971)**). To determine whether there is sufficient evidence to support a conviction, we view the evidence in the light most favorable to the prosecution and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. **State v. Engle, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009)**.

In this case for the September 4, 2009 charge the State did not prove beyond a reasonable doubt that the appellant made a controlled buy from the CI, Miss Crasper. The State has audio and video showing a white male that made the controlled buy. The

State decided not to arrest this individual. Instead they arrested the appellant and convicted him, as an accomplice on this charge, without having a principal, or without proving beyond a reasonable doubt that he knew or help to facilitate the buy on the date in question.

d. STATE ERRED WHEN IN CHARGED THE APPELLANT AS AN ACCOMPLICE TO THE SEPTEMBER 4TH CRIME, AFTER NOT ARRESTING THE SUBJECT WHO MADE THE BUY, AND WITHOUT PROVING BEYOND A REASONABLE DOUBT THAT HE KNEW ABOUT THE CRIME OR HELPED TO FACILITATE THE CONTROLLED BUY.

Washington State Supreme Court, clarified in **State v. Roberts**, accomplice liability law, by holding that the putative accomplice must have acted with knowledge that his or her conduct would promote or facilitate “*the crime*” for which he or she is eventually charged, and that knowledge of “‘*a crime*’ does not impose strict liability for any and all offenses that follow.” **142 Wn.2d at 513**; also see **State v. Cronin, 142 Wn.2d 568, 579, 14 P.3d 752 (2000)**. Thus, an accomplice liability instruction that allowed liability to attach if found that the person was an accomplice in the commission of “a crime,” as opposed to “the crime” was erroneous because it departed from Washington’s accomplice liability statute. **Roberts, 142 Wn.2d at 513.**

1. ACCOMPLICE LIABILITY.

- (1) A person is guilty of a crime if it is committed by the conduct of another person for which he is legally accountable.
- (2) A person is legally accountable for the conduct of another person when:
 - (a) Acting with the kind of culpability that is sufficient for the commission of the crime, he causes an innocent or irresponsible person to engage in such conduct; or
 - (b) He is made accountable for the conduct of such other person by this title or by the law defining the crime; or
 - (c) He is an accomplice of such other person in the commission of the crime.

- (3) A person is an accomplice of another person in the commission of a crime if:
 - (a) With knowledge that it will promote or facilitates the commission of the crime, he
 - (i) solicits, commands, encourages, or request such other person to commit it; or
 - (ii) aids or agrees to aid such other person in the planning or committing it; or
 - (b) His conduct is expressly declared by law to establish his complicity.

In the case at hand, the State has audio and video surveillance of a white man making the controlled buy on September 4, 2009 with the CI, Ms. Crasper, who at the time was wearing an audio wire device. The video, which was not as clear as the State would like it to have been, allegedly shows the appellant on a cell phone at the time. The prosecutor state in Closing Arguments...*unfortunately it's difficult to make out who that is in the video. I have to apologize for the quality of that but bear in mind Det. Laughlin was out on the street reacting to whatever may happen there, changing his position, not knowing exactly what circumstances were going to happen, and the video was taken as well and it was a hand-held camcorder-type of camera...* (See Exhibit 1).

Just because the State says the appellant was allegedly on the phone does not prove beyond a reasonable doubt that he was involved or had knowledge of or helped facilitate the controlled buy on September 4, 2009. The State even had the phone number that they were calling to set up the controlled buys check to see if the number came back to the appellant; it did not come back to him.

Accomplice liability, though not an “element,” must still be proved by the State beyond a reasonable doubt in order for a jury to convict. See **State v. Cronin, 142 Wn.2d 568, 579-80, 14 P.3d 752 (2000)**. The Legislature intended that an accomplice “have the purpose to promote or facilitate the *particular conduct that forms the basis for*

the charge,” and the accomplice “will not be liable for conduct that does not fall with this; purpose.” **Id. 510-11** (quoting from the comment to **MODEL PENAL CODE § 2.06 (3) (a)**, which is identical to **RCW 9A.08.020 (3) (a)**). In this particular charge, the State did not prove beyond a reasonable doubt that the appellant had knowledge of the crime. Even with the State using the “in for a dime in for a dollar” premise, which the Supreme Court has stated, that it is not the best descriptor of Washington’s accomplice liability law. The sufficiency of the evidence on this particular charge, is that they have a video that shows a white male who made the buy, and it allegedly show a black male on a cell phone who the State is saying was the appellant, and they have audio from the CI, Ms. Crasper, who was wearing an audio device, and proves the voice of the white male, and this is what the State says makes the appellant an accomplice in this charge, even though they ran a check on the number they were calling and it didn’t come back to the appellant. (**RP Vol. I, Oct 5, 2010, pgs. 68-85, Appendix E**).

3. CONCLUSION

As this Honorable Court can see, the controlled buy on August 28, 2009, was not in the charging document, which would prejudice the appellant by lack of notice, the fabricated controlled buy on August 20, 2009 which the state used as deception, because it never happened, never appeared in any form before trial, nor was it charged, and the September 4, 2009, which the state charged the appellant with as an accomplice without a principal, not proving beyond a reasonable doubt that he had any knowledge of this crime, lack any sort of merit to help the state’s case. The appellant’s attorney filed a Motion to Compel (**See Appendix F**), before trial, due to the fact that his client was being charged for three controlled buys with 4 dates which are August 11th, August 12th,

August 28th, and September 4th of 2009. Defense attorney was under the impression that there was another audio and video tape of the controlled buy on August 28, 2009, due to the fact that the Police Report stated, Det. Laughlin gave the video tape to Det. Nelson.

(See Appendix A, Longarm Case Report). The Court stated in the Motion to Compel...with the representation there's only one, they won't be allowed to bring anything else in...

In closing the appellant is requesting that this Honorable Court dismiss the controlled buys on August 28, 2009 for lack of notice and September 4, 2009 due to the essential elements of the crime charged were not proven beyond a reasonable doubt by the state.

DATED this 16 day of June, 2011.

Respectfully submitted,


Michael R. Smith


Melissa Kathleen Gilbert

SIGNED AND SWORN TO before me June 16, 2011

A Notary Public for the State of Washington

Who resides in Connell

My Commission expires: 10-10-2012



p. 8 of 8 Statement of Additional
Grounds

1 A. Complete controlled buys on a certain amount of targets.

2 Q. Okay. And who was to provide information as to the identity
3 of the targets?

4 A. She was to provide the information.

5 Q. Directing your attention to August 20th of last year, did
6 any portion of the investigation involving Mr. Smith take
7 place on that date?

8 A. It did. It was our first attempted buy with him.

9 Q. And were you present when any phone calls were made to
10 Mr. Smith?

11 A. I was.

12 Q. Okay. And were you aware of the number that was dialed?

13 A. I was.

14 Q. And what number was that?

15 A. 360-220-1673.

16 Q. Okay. Throughout the course of the investigation, several
17 more phone calls were made in connection with Mr. Smith,
18 were they not?

19 A. There were.

20 Q. And were you present when those calls were made?

21 A. I were -- excuse me, I was.

22 Q. And was the same number dialed every time?

23 A. It was.

24 Q. And how do you know what number was being dialed?

25 A. She showed me the phone each time prior to making the phone

1 call, showing me the listed number. It stated "Mike" and
2 showed ~~the~~ the phone number in full, and then she'd dial that
3 number or hit the "Send" button on that number.

4 Q. And were you able to -- to listen in on what was being said
5 by the other party in that conversation on the phone?

6 A. I was.

7 Q. And how did you do so?

8 A. The phone was tipped in a fashion that I could actually hear
9 what was being said on the other line as well.

→ 10 Q. And, on August 20th, was a phone call made to the number
11 that you previously stated?

12 A. Yes, it was.

13 Q. And what was discussed on that telephone call?

14 A. There was a discussion between Ms. Crapser and a male in
15 regards to the price. Well, initially, she stated she
16 wanted to play basketball, which she informed me is a common
17 term for an eight ball of heroin. Then she asked how much
18 that would be, to which he replied \$130, and then they
19 agreed upon a meeting location at that time.

20 Q. Okay. So she calls up someone she's identified as a drug
21 dealer at the telephone number that she gave you; is that
22 correct?

23 A. Correct.

24 Q. And then she says, "I want to play basketball with you"?

25 A. Correct.

Detective KYLE Nelson testimony

1 A. She was followed to the deal by myself.

2 Q. And she didn't stop anywhere on the way or speak with anyone
3 you could see from following behind her?

4 A. That is correct.

5 Q. And were there other detectives involved in surveillance of
6 the actual buy location?

7 A. Yes, Sergeant Murphy was in the area, Detective Laughlin,
8 and Detective Poortinga were also in the area.

9 Q. When you got to that location, where did you follow her to?

10 A. I followed her to the corner of Texas and Pacific Street, at
11 which time she took a left-hand turn, traveling eastbound on
12 Texas Street, and one of the surveillance units picked her
13 up by visual sight at that point and I continued to drive
14 by.

15 Q. And were you in uniform that night?

16 A. I was not.

17 Q. Were you driving a marked police car?

18 A. I was not.

19 Q. Did you have some concerns that you may be spotted as a
20 detective or as a police officer if you followed her to the
21 exact location?

22 A. I did. There's always a concern in regards to
23 countersurveillance, which is a drug dealer who will have
24 other people watching the location for suspicious activity,
25 like another car following her.

APPENDIX A.

Appendix (A)

December 16, 2009

Bellingham Police Department

Investigator:
Not assigned

Page 1 of 1

Longarm Case Report

09B31111 DRUG - NARCOTICS VIOLATIONS

NARRATIVE

Follow-Up

Author: **LAUGHLIN, BROOKS**

Rpt date: **Aug 28, 2009 6:00 PM**

Appvd: **176**

Charges:

SMITH, MICHAEL ROOSEVELT	Aug 22, 1971	1 count	69.50.401	Prohibited acts: A--Penalties
		1 count	69.50.4013	Possession Of A Controlled Substance

On 8-28-09 at approximately 1800 hrs, I assisted DET NELSON with a drug investigation in the city of Bellingham. My role in this investigation was surveillance.

I arrived at the buy location and observed the CI make contact with the target. The CI and the target met for a brief period of time and I observed the target reach over to the CI and hand him/her something. The two met for less than a minute and I watched the suspect walk away from the buy location.

CI #637 met with ~~DET NELSON~~ at a different location.

I gave DET NELSON the video tape.

Nothing further.

Appendix (A)

December 16, 2009
Page 1 of 2

Bellingham Police Department
Longarm Case Report

Investig
Not assigned

09B31111 DRUG - NARCOTICS VIOLATIONS

NARRATIVE

Follow-Up Author: **POORTINGA, KENT** Rpt date: **Aug 28, 2009 6:00 PM** Appvd: **176**

Charges:

SMITH, MICHAEL ROOSEVELT	Aug 22, 1971	1 count	69.50.401	Prohibited acts: A--Penalties
		1 count	69.50.4013	Possession Of A Controlled Substance

On 08-28-09 I assisted DET NELSON with a drugs sales/delivery that occurred within the city of Bellingham.

I set up in the area of the buy location and began surveillance. I observed the target walking around waiting for the CI. Once the CI arrived in the area of the buy he/she met up with the target and completed the deal.

Once at the station I contacted DET NELSON who gave me several pieces of suspected heroin individually wrapped in plastic. I weighed and field tested the 3.2 grams of suspected Heroin using NIK Test Kit K resulting in a positive color change indicating the presumptive presence of Heroin.

The suspected heroin has been impounded for evidence and further testing.

APPENDIX
(A)

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2009 DEC 17 PM 3:51

WHATCOM COUNTY
WASHINGTON

BY W

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
FOR WHATCOM COUNTY

THE STATE OF WASHINGTON,

Plaintiff.

vs.

MICHAEL ROOSEVELT SMITH,

Defendant.

PCN: 900,308,230

)
) No.: 09-1-01508-5
)
)
) INFORMATION FOR:
)
) DELIVERY OF A CONTROLLED
) SUBSTANCE, TO-WIT: HEROIN,
) COUNT I, DELIVERY OF A
) CONTROLLED SUBSTANCE, TO-
) WIT: HEROIN, COUNT II, DELIVERY
) OF A CONTROLLED SUBSTANCE,
) TO-WIT: HEROIN, COUNT III,
) UNLAWFUL POSSESSION OF A
) CONTROLLED SUBSTANCE WITH
) INTENT TO DELIVER, TO-WIT:
) HEROIN, COUNT IV and UNLAWFUL
) POSSESSION OF A CONTROLLED
) SUBSTANCE, TO-WIT: SUBOXONE,
) COUNT V

I, CRAIG D. CHAMBERS, Deputy Prosecuting Attorney in and for Whatcom County, State of Washington, comes now in the name and by the authority of the State of Washington and by this information do accuse MICHAEL ROOSEVELT SMITH with the crime(s) of DELIVERY OF A CONTROLLED SUBSTANCE, TO-WIT: HEROIN, COUNT I, DELIVERY OF A CONTROLLED SUBSTANCE, TO-WIT: HEROIN, COUNT II, DELIVERY OF A CONTROLLED SUBSTANCE, TO-WIT: HEROIN, COUNT III, UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER, TO-WIT: HEROIN, COUNT IV and UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, TO-WIT: SUBOXONE, COUNT V, committed as follows:

1 then and there being in Whatcom County, Washington,

3 **DELIVERY OF A CONTROLLED SUBSTANCE, TO-WIT: HEROIN, COUNT I**

5 That on or about the 12th day of August, 2009, the said defendant, MICHAEL ROOSEVELT
7 SMITH, then and there being in said county and state, knowing he was delivering a controlled
substance, did deliver such substance, to-wit: Heroin, in violation of RCW 69.50.401(2)(A),
which violation is a Drug Class B Felony;

9 **DELIVERY OF A CONTROLLED SUBSTANCE, TO-WIT: HEROIN, COUNT II**

11 That on or about the 11th day of August, 2009, the said defendant, MICHAEL ROOSEVELT
13 SMITH, then and there being in said county and state, knowing he was delivering a controlled
substance, did deliver such substance, to-wit: Heroin, in violation of RCW 69.50.401(2)(A),
which violation is a Drug Class B Felony;

15 **DELIVERY OF A CONTROLLED SUBSTANCE, TO-WIT: HEROIN, COUNT III**

17 That on or about the 4th day of September, 2009, the said defendant, MICHAEL ROOSEVELT
19 SMITH, then and there being in said county and state, knowing he was delivering a controlled
substance, did deliver such substance, to-wit: Heroin, in violation of RCW 69.50.401(2)(A),
which violation is a Drug Class B Felony;

21 **UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO
23 DELIVER, TO-WIT: HEROIN, COUNT IV**

25 That on or about the 16th day of December, 2009, the said defendant, MICHAEL ROOSEVELT
27 SMITH, then and there being in said county and state, with intent to deliver a controlled
substance, did possess that substance, to-wit: Heroin, in violation of RCW 69.50.401(2)(A),
which violation is a Drug Class B Felony;

29 **UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE, TO-WIT:
SUBOXONE, COUNT V**

31 That on or about the 16th day of December, 2009, the said defendant, MICHAEL ROOSEVELT
33 SMITH, then and there being in said county and state, did unlawfully possess a controlled-
substance, to-wit: Suboxone, in violation of RCW 69.50.4013(1), which violation is a Class C
Felony;

35 contrary to the form of the Statute in such cases made and provided and against the peace and
37 dignity of the State of Washington.

39 DATED THIS 17th day of December, 2009.



43 CRAIG D. CHAMBERS, WSBA #11771, Deputy Prosecuting Attorney
45 in and for Whatcom County, State of Washington

47 STATE OF WASHINGTON)

APPENDIX (A)

1)
COUNTY OF WHATCOM) ss.

3
5 I, Craig D. Chambers, being first duly sworn on oath, depose and say: that I am a duly
7 appointed and acting Deputy Prosecuting Attorney in and for Whatcom County, State of
9 Washington. I have read the foregoing information, know the contents thereof and the same is
true as I verily believe.



11 _____
CRAIG D. CHAMBERS, #11771
Deputy Prosecuting Attorney

13 SUBSCRIBED AND SWORN to before me this 17th day of December, 2009.



17 _____
NOTARY PUBLIC in and for the
19 State of Washington. My commission
21 expires on: October 29, 2013

APPENDIX (A)

1 Additionally, there were two Camel cigarette boxes in the lock box. One of these contained a
3 small bundle of a dark brown substance that field tested positive for the presence of heroin. The
5 other cigarette box was empty. In the three preceding drug purchases, the heroin on each case
7 had been delivered to the informant in a empty Camel cigarette box. Also found in the lock box
9 at the time of the search was a Suboxone pill. Suboxone is a Schedule III narcotic. The Suboxone
11 pill was identified by its distinctive color and stamping.

13 All of the above events occurred in Whatcom County, Washington.

15 

17 Craig D. Chambers, #11771
19 Deputy Prosecuting Attorney

21 SUBSCRIBED AND SWORN to before me this 17th day of December, 2009.

23 

25 NOTARY PUBLIC in and for the State of
27 Washington. My commission expires:
29 October 29, 2013

APPENDIX B

- 1 search their body, but we don't search cavities, no, sir.
- 2 Q. Do you know what law it is that prohibits you from --
- 3 A. I don't know. I just know I'm not allowed to.
- 4 Q. On the 20th, you surveilled -- sorry. On the 20th, you
- 5 surveilled the house, correct? Or apartment, I'm sorry.
- 6 A. I did.
- 7 Q. And did you use any video surveillance for that?
- 8 A. No, I did not.
- 9 Q. And you saw a white male leave that apartment?
- 10 A. I did.
- 11 Q. And I'm assuming that coinciding with Detective Laughlin's
- 12 report, that was the same white male that was unable to
- 13 perform the delivery on that day?
- 14 A. I didn't see the white male on the other end. I just know
- 15 that I saw this particular white male walk and then
- 16 Detective Laughlin said she saw a white male matching the
- 17 description I gave walk to the confidential informant.
- 18 Q. And, on September 4th, you surveilled the apartment again?
- 19 A. Yes, I did.
- 20 Q. And did you use any video surveillance at that point?
- 21 A. No, I did not. I was too close.
- 22 Q. You were too close, can you explain that?
- 23 A. Sure. If I'm sitting in a car with a video camera and
- 24 someone's going to walk right in front of my vehicle, I
- 25 don't want the video camera to be seen. I don't want

Sergeant Murphy testify

1 call, showing me the listed number. It stated "Mike" and
2 showed the phone number in full, and then she'd dial that
3 number or hit the "Send" button on that number.

4 Q. And were you able to -- to listen in on what was being said
5 by the other party in that conversation on the phone?

6 A. I was.

7 Q. And how did you do so?

8 A. The phone was tipped in a fashion that I could actually hear
9 what was being said on the other line as well.

→ 10 Q. And, on August 20th, was a phone call made to the number
11 that you previously stated?

12 A. Yes, it was.

13 Q. And what was discussed on that telephone call?

14 A. There was a discussion between Ms. Crapser and a male in
15 regards to the price. Well, initially, she stated she
16 wanted to play basketball, which she informed me is a common
17 term for an eight ball of heroin. Then she asked how much
18 that would be, to which he replied \$130, and then they
19 agreed upon a meeting location at that time.

20 Q. Okay. So she calls up someone she's identified as a drug
21 dealer at the telephone number that she gave you; is that
22 correct?

23 A. Correct.

24 Q. And then she says, "I want to play basketball with you"?

25 A. Correct.

Detective KYLE Nelson testimony

Appendix (B)

1 Q So the quantum of time where the white male was in
2 contact at the driver's side of the informant's
3 vehicle, was that accurately depicted in Exhibit 13?

4 A Yes, it was.

5 MR. CHAMBERS: No further questions of this
6 witness.

7 THE COURT: Mr. Hall, you may inquire.

8 MR. HALL: Thank you, Your Honor.

9 CROSS-EXAMINATION

10 BY MR. HALL:

11 Q Detective, I'll go through this in the same order that
12 Mr. Chambers did. You conducted audio and video
13 surveillance on August 20th, correct?

14 A I did not conduct any audio surveillance.

15 Q Video surveillance?

16 A None that I recall, no.

17 Q On August 20th, what was your role in that part of the
18 investigation?

19 A Just visual surveillance.

20 Q Okay. I guess I misunderstood that on direct
21 examination. You said a white male approached the
22 confidential informant, right?

23 A That's correct.

24 Q A deal was not completed?

25 A No. The confidential informant did not know this

APPENDIX C

1 Q And you are seeking, and your officers were in
2 contact with Mike today, is that correct?

3 A That is correct, they saw him walking and made
4 contact with him and he chose not to speak with
5 them and vanished inside his apartment number 23 in
6 which the officers saw, the detective saw him go
7 inside the apartment, that was probably about two
8 and a half hours ago now.

9 Q And that's the location where you observed him in
10 the walk-way outside on the phone talking at the
11 same time that the informant was speaking with
12 Mike, is that correct?

13 A It is the same apartment indeed and my three
14 detectives have stepped in on this apartment and
15 have not (inaudible).

16 — Q All right. And another individual that you
17 contacted in the past, well before that, what are
18 the dates of the three deliveries?

19 — A The three deliveries occurred, there was one on 9-
20 4-09, the second occurred on, I am sorry the very
21 first was 8-11-09, the second was 9-4-09, the third
22 was 9-28-09 and there was one more in the middle of
23 those, I am unsure of the date where a phone call
24 was made and arrangement was made to buy heroin and
25 Mike ended up sending a runner and the confidential
26 informant did not complete the purchase as the
27 confidential informant did not know the runner so
28 there were four attempts made but three successful

APPENDIX D

1 You have the audio. You have all the observations of
2 the officers that were watching all this stuff happen.
3 That's why they do the drug deals that way. They
4 search the car, they search the person, so you don't
5 have to rely just on the testimony of one person versus
6 another.

7 And then something that's particularly telling in
8 deciding between Miss Crapser and Mr. Smith is the deal
9 that didn't happen. You recall that there was a deal
10 that didn't happen on August 20th of 2009, the first
11 one, where they called the same number, they set up a
12 deal, Mr. Smith told her where to go and park.
13 Detective Laughlin was watching and Sergeant Murphy was
14 over there watching Mr. Smith's apartment. White male
15 leaves the apartment, heads in the direction of Miss
16 Crapser. Detective Laughlin sees this individual walk
17 up to Miss Crapser's car in the alley and there's just
18 a brief conversation between those folks. Miss Crapser
19 drives off. She told you on the stand I didn't know
20 that guy, I wasn't going to deal with him. I called
21 Mike. I didn't know who this guy was. And the State
22 submits if she was out just getting anybody she could
23 to falsely accuse Mr. Smith of the crime she would have
24 done that deal. She would have just gone here's the
25 money, give me the heroin, and driven off, other than

APPENDIX (D)

1 aborting the deal and not go through with it. And
2 she's so crafty.

3 You also heard that after that aborted deal
4 occurred on August 20th, Detective Nelson called up the
5 number again afterwards and overheard the conversation
6 where the person on the other end said oh, no, you
7 spooked my guy. I sent my partner over there and when
8 you drove off you kind of spooked him, but we can do
9 some deals in the future. Did she manufacture that
10 person? Did she come up with the voice on the phone?
11 She's so crafty that she figured it all out and planned
12 it all ahead of time? No.

13 So, the general facts that I mentioned to begin
14 with, if it looks like a skunk, smells like a skunk,
15 gotta be a skunk, are borne out by the individual
16 details of the investigation. And none of those
17 general facts are negated by anything presented by
18 Mr. Smith in his testimony and his explanation or
19 excuses for what happened on that particular day.

20 Another thing to consider is in whatever weight
21 you want to give Mr. Smith's testimony. You heard this
22 morning all the crimes he's been convicted of, robbery,
23 attempted robbery, forgery, theft, burglary, you might
24 be asking yourself, well, what does that have to do
25 with what's going on here. Well, what it has to do

EXHIBIT 1

Exhibit (1)

1 said it wasn't him that was standing outside the Little
2 Bugs store on April 28th, 2009; it wasn't him that
3 reached into Miss Crapser's car and did an exchange of
4 heroin. He also says it wasn't him in the video taken
5 on September 4th where the three individuals walked
6 down the sidewalk and we saw one of those individuals
7 break off and contact Miss Crapser. I will replay the
8 video for you. The individual looks like it matches
9 Mr. Smith there walking on the inside part. There's
10 the individual going over to Miss Crapser making the
11 deal and they're walking -- unfortunately it's
12 difficult to make out who that is in the video. I have
13 to apologize for the quality of that but bear in mind
14 Detective Laughlin was out on the street reacting to
15 whatever may happen there, changing his position, not
16 knowing exactly what circumstances were going to
17 happen, and the video was taken as well and it was a
18 hand-held camcorder-type of camera.

19 And Mr. Smith says the lock box found in his
20 apartment in the closet containing all the heroin
21 wasn't his, it was his friend Garrett's. He also at
22 one point in time said under oath that he didn't say
23 anything about Garrett on that occasion, he said the
24 police officers planted that lock box in his apartment.
25 And admitted doing so today this morning making that

APPENDIX E

Appendix (E)

- 1 in this case I did in the event as well.
- 2 Q. Anything that she described to you inconsistent with what
- 3 you either observed or the other officers told you?
- 4 A. No.
- 5 Q. Were any calls made to Mr. Smith following August 28th of
- 6 2009?
- 7 A. There were.
- 8 Q. When was the next date where calls were made?
- 9 A. September 4th, 2009.
- 10 Q. And were you present when that telephone call was made?
- 11 A. I was.
- 12 Q. And was it made to the same telephone number?
- 13 A. It was.
- 14 Q. And were you able to listen in on that telephone call?
- 15 A. I was.
- 16 Q. And what did you hear?
- 17 A. Again, the informant asked to play basketball, to which the
- 18 male replied, in quotes, "Yeah, let's play basketball."
- 19 They agreed upon meeting on Toledo Street. And, at that
- 20 point, they had already discussed the price for that amount
- 21 of heroin, so it was understood that it was already \$130 and
- 22 was not actually discussed on the phone.
- 23 Q. Was Ms. Crapser searched on that occasion?
- 24 A. Yes, she was.
- 25 Q. And which officer?

Appendix (E)

- 1 A. I'm sorry, Sergeant Murphy had searched.
- 2 Q. And was her vehicle searched?
- 3 A. It was.
- 4 Q. And was she given buy money?
- 5 A. She was.
- 6 Q. And was she permitted to drive to the Toledo/Alabama Street
7 location?
- 8 A. She was.
- 9 Q. And it was her vehicle and she was by herself?
- 10 A. She was. I followed her to that location in a separate
11 vehicle.
- 12 Q. Was she outfitted with any kind of transmitting recording
13 device?
- 14 A. She was. She was given two different devices, one of which
15 just records and one of which records and transmits to a
16 receiver that was located in my vehicle.
- 17 Q. And did you go through the procedure or process necessary to
18 record the conversation?
- 19 A. I did. I applied for and was granted a body wire
20 application by Lieutenant Snyder of the Bellingham Police
21 Department.
- 22 THE CLERK: Marking Plaintiff's Exhibit Number 31.
- 23 Q. (BY MR. CHAMBERS) Handing you what has been marked
24 Plaintiff's Exhibit 31, can you identify that, please?
- 25 A. (Witness reviewing documents.) It is a copy of the original

Appendix (E)

- 1 saying in her car while she was parked on Toledo Street over
2 the recording device, correct?
- 3 A. Correct.
- 4 Q. And what, was it in her car or was it on her person?
- 5 A. It was located inside of her vehicle.
- 6 Q. And so, you were able to hear what was being said as it was
7 being said; is that correct?
- 8 A. Correct.
- 9 Q. And a recording was being made of what was being said?
- 10 A. Correct, two recordings.
- 11 Q. And, after that date, after September 4th, 2009, were you
12 able to listen to what -- the contents of the recording?
- 13 A. I was.
- 14 Q. And did the recording accurately depict what you had heard
15 in realtime?
- 16 A. It did.
- 17 Q. And did you do anything to process the contents of that
18 recording?
- 19 A. I transferred the file from one of the recordings to the
20 hard drive of the computer as Officer Schwallie had
21 described it earlier today.
- 22 Q. You used the little connector cable?
- 23 A. The connector cable, yeah.
- 24 Q. And was a transcript made of that recording?
- 25 A. I made a transcript of the recording.

Appendix (E)

- 1 other voice as well as Ms. Crapser in response?
- 2 A. I did.
- 3 Q. And when did you next see Ms. Crapser on September 4th of
4 2009?
- 5 A. I again followed her back to the Bellingham Police
6 Department. Once we arrived, she provided me with a Camel
7 cigarette container which contained several small bindles,
8 once again, of a brown tar-like substance that I recognized
9 to be heroin.
- 10 Q. And handing you what has been marked Exhibit 3, could you
11 open that envelope and identify its contents, please?
- 12 A. Yes, sir (opening envelope).
- 13 Q. What are its contents?
- 14 A. It's a Camel cigarette container that's empty, appears to be
15 empty, and a second smaller Ziplock baggie containing what
16 appears to be five small bindles of a brown tar-like
17 substance.
- 18 Q. And does it bear any resemblance to what Ms. Crapser handed
19 to you?
- 20 A. Essentially, other than the blue evidence tape from the
21 Washington State Crime Lab.
- 22 Q. Same envelope?
- 23 A. Appears to be.
- 24 Q. Is it substantially, outside of the evidence tape, in the
25 same condition?

APPENDIX (E)

1 THE COURT: Defense objected to that. You want to state
2 your objections for the record, Mr. Hall?

3 MR. HALL: My objection is first on authenticity grounds.
4 I'm not sure Detective Nelson can authenticate the recording
5 as to what's on it. I'm not sure he's qualified in any sort
6 of way as a transcriber or transcriptionist, whatever the
7 word is.

8 On top of that, the relevancy of Detective Nelson's
9 opinion as to what's on the tape I think is limited. If
10 it's being what's on it, the jury can hear the tape for
11 themselves, decide that for themselves as to what's on it,
12 its accuracy or, you know, the pertinentness -- or how
13 pertinent it is I guess to this case. Defense will have no
14 objection to the admissibility of the tape or the recording
15 itself.

16 THE COURT: The State represented to the Court that the
17 tape was not that audible or there's some less-than-ideal
18 recording, at least that's what I understood. And I
19 indicated to the parties that I would go ahead and just hear
20 the tape myself. So why don't you play that portion that
21 you wish to play for the jury?

22 (Audiotape being played
23 without the jury as follows:)

24 FEMALE: It doesn't open. Sorry, that side doesn't open.

25 MALE: Okay.

Appendix (E)

1 jury to make those findings. Okay. I'm not going to give
2 the transcript. I'll just instruct the jury they need to
3 listen to it carefully, and if anybody wants it to be played
4 a second time, I'll permit that to be done. If you want to
5 move it closer to the jury box, you can do that, too, and
6 then you can argue, you know. You can argue to the jury
7 what the tape says.

8 MR. CHAMBERS: And the basis of -- I mean, I know, Your
9 Honor, --

10 THE COURT: It's not clear.

11 MR. CHAMBERS: -- we've done the transcripts prior.

12 THE COURT: Some of it's unclear to me, Mr. Chambers.

13 MR. CHAMBERS: Some of the content of the tape?

14 THE COURT: Yeah.

15 MR. CHAMBERS: Well --

16 THE COURT: And if it's not clear to me, I think I have
17 to probably go along with the defense objection that if I
18 can't transcription-wise say with certainty what it is, then
19 I think the defense objection to another individual's
20 opinion of what it says is an opinion as to what the tape
21 says, and I'm just not going to allow that. Okay. But you
22 can both argue if you want the transcript.

23 MR. CHAMBERS: Yeah, I would say if he thinks that it
24 says something other than what we say it is, then he can --

25 THE COURT: I'm saying I can't tell what it is in court

APPENDIX (E)

1 is -- that is what he says is roughly accurate.

2 THE COURT: He can't testify as to what other people said
3 if he wasn't there to hear it. Okay?

4 MR. CHAMBERS: But you realize he was listening as it was
5 being said?

6 THE COURT: Well, if you want to ask him if he heard the
7 male that made the deal, what the male said, I'll let him
8 testify as to what he heard if he heard the voice.

9 MR. CHAMBERS: Okay.

10 THE COURT: I don't have a problem with that if that's
11 what he heard. We're talking here about the accuracy of a
12 transcript, which is a different issue.

13 MR. CHAMBERS: Okay. All right.

14 MR. HALL: Your Honor, I would -- I guess you may have
15 already made your ruling, but just for purposes of the
16 record, I'm going to object to him testifying to what's on
17 the tape at all, because that is hearsay. There is no --

18 MR. CHAMBERS: It's not hearsay. There's no hearsay.
19 The conversation in which a drug deal occurs is not hearsay
20 for the truth. It's relevant. It's not a hearsay
21 objection. I mean, Your Honor's not ruling --

22 MR. HALL: It's -- it's a statement against interest from
23 a Defendant if it's the Defendant on the tape. This is
24 clearly not the Defendant on the tape, because this is from
25 the 9-4-09 incident, which was not with -- was not

Appendix (E)

1 approximate time when you outfitted the informant with the
2 transmitter recording device?

3 A. The approximate time of day?

4 Q. Yes.

5 A. I do not.

6 Q. Did you have to turn it on and engage it in order to make it
7 operational?

8 A. I did.

9 Q. And did you remove it from Ms. Crapser at any point in time?

10 A. After the controlled buy occurred.

11 Q. Okay. And then you turned it off prior to removing it?

12 A. Once I got -- obtained it from her, then I turned it off,
13 yes.

14 Q. And so, the rest of that time, from the time you turned it
15 on until the time you turned it off, was it transmitting and
16 recording?

17 A. It was.

18 Q. And did it record the portion of the conversation that we
19 observed in the video where the individual walked up to her
20 car?

21 A. It did.

22 Q. And were you able to listen during the portion of the
23 interaction where the -- the person broke off from the other
24 two individuals and walked up to her car that we saw in the
25 video?

1 Crapser replied, "Yes." He asked, "How much?" She states,
2 "130."

3 Q. And that snippet of the entire recording that took place on
4 that date, that was where -- what was going down at the time
5 that that recording is being made?

6 A. That small section of about 15 to 20 seconds was essentially
7 when three males were walking up. The one white male breaks
8 off and goes to her passenger side door, attempts to open
9 the door, at which point she tells him it doesn't open. He
10 walks around and completes the drug transaction and leaves.

11 Q. Were you involved in -- I think I already asked you this,
12 but, again, with the execution of a search warrant at 1517
13 Texas, Number 23, on December 15th?

14 A. Yes, sir, I was.

15 Q. And at the time that warrant was executed, how many people
16 were in the apartment?

17 A. How many people were located in the apartment?

18 Q. Yes.

19 A. Just Mr. Smith.

20 Q. And can you identify Mr. Smith?

21 A. Mr. Smith's the black male wearing the yellow T-shirt and
22 black pants at the moment.

23 MR. CHAMBERS: I request that the record reflect that the
24 witness has identified the Defendant.

25 THE COURT: It may.

1 A. We did.

2 Q. And why did you seize those as evidence?

3 A. It was his form of packaging his heroin as shown as evidence
4 in the second controlled buy that was done.

5 Q. Again, handing you what has been marked Exhibit 8, could you
6 examine the contents of that bag?

7 A. (Witness opening bag.) It's a silver digital scale.

8 Q. Why did you seize that particular item as evidence?

9 A. Digital scales are commonly used for drug transactions to
10 actually weigh out exact amounts. In many cases, drug
11 dealers buy large portions of individual drugs and heroin
12 and break off portions and weigh it off to exact portions,
13 an eighth of an ounce or an eight ball of heroin, or three
14 grams on a digital scale, package it and then sell it.

15 Q. And is this item -- handing you what has been marked Exhibit
16 1, could you open that and identify that?

17 A. (Witness opening bag.) It's a black and silver lockbox.

18 Q. Was that item seized in the execution of the search warrant?

19 A. It was.

20 MR. CHAMBERS: State would offer Exhibit 1.

21 MR. HALL: No objection.

22 THE COURT: 1's admitted.

23 MR. CHAMBERS: That's all the questions I have.

24 THE COURT: Okay, Mr. Hall.

25

CROSS-EXAMINATION

APPENDIX F

1 date. And the reports are August 11th, August 12th,
2 August 28th and September 4th, although he is charged
3 with three controlled buys, not four controlled buys,
4 or four deliveries, and the defense at this point is
5 kind of left in a position of not knowing what the
6 video is. Information that we do have, and the other
7 police reports indicate, that there is other audio and
8 video available from, I think, three of those four
9 days.

10 So the defense is seeking to have all of that
11 given to us. Or in the alternative that if not
12 provided within, say, a week or two of today's date,
13 that it be precluded and can't be brought up at a later
14 time from the State.

15 MR. CHAMBERS: He's got all the audio and video.

16 THE COURT: There's only one?

17 MR. CHAMBERS: Yes.

18 THE COURT: Audio and video?

19 MR. CHAMBERS: Yes.

20 THE COURT: That's what you have from the State?

21 MR. HALL: That's fine if that's what we have,
22 Your Honor. I guess I don't want to be surprised at
23 some later date given what we have in the police
24 reports.

25 THE COURT: With the representation there's only

Appendix (F)

1 one, they won't be allowed to bring anything else in.

2 MR. HALL: I trust what Mr. Chambers is saying.
3 It's just the police reports are different than what
4 Mr. Chambers is saying. I don't know who's correct.

5 THE COURT: That's where we are at. Okay?
6 We'll get this resolved as quickly as we can.

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EP

No. 66143-4-I, St. v. Smith

CERTIFICATE OF SERVICE

I, Michael R. Smith did on the 21 day of June, 2011, place in the U.S. Mail at Coyote Ridge Corrections Center, a copy of a Statement of Additional Grounds Brief, and served to the following Individuals.

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