

74767-3

FILED
October 10, 2016
Court of Appeals
Division I
State of Washington

74767-3

No. 74767-3-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

TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 1

C. ISSUES..... 2

D. STATEMENT OF THE CASE..... 4

E. ARGUMENT 8

 1. The admission of testimonial statements made by an absent government informant violated Mr. Nord’s confrontation rights under the Sixth Amendment and article I, § 22. 8

 a. In criminal trials, the confrontation clause prohibits admission of testimonial statements from an absent witness..... 8

 b. In the first appeal, this Court erred by refusing to review Mr. Nord’s confrontation right claim. To correct this injustice, this Court may now properly review the claim. 9

 c. The admission of testimonial hearsay from the absent government informant was manifest constitutional error that is properly addressed for the first time on appeal. 16

 d. The informant’s statements were testimonial hearsay. 18

 e. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt..... 22

 2. When combined with the term of confinement, the term of community custody exceeds the statutory maximum of the offense. Because this is unlawful, remand for correction of the judgment and sentence is required. 25

 3. No costs should be imposed for this appeal..... 27

F. CONCLUSION..... 28

TABLE OF AUTHORITIES

United States Supreme Court Cases

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... 22

Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004)..... 9, 14, 19, 20

Danforth v. Minnesota, 552 U.S. 264, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008)..... 13

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) 12, 13

Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011)..... 14

Tennessee v. Street, 471 U.S. 409, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)..... 20

Younger v. Harris, 401 U.S. 37, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971). 14

Washington Supreme Court Cases

In re Disciplinary Proceeding Against Sanai, 177 Wn.2d 743, 302 P.3d 864 (2013)..... 12

In re Welfare of Wilson, 91 Wn.2d 487, P.2d 1161 (1979)..... 24

Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005)..... 1, 10, 11, 15

State v. Beadle, 173 Wn.2d 97, 265 P.3d 863 (2011)..... 19

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 11, 27

State v. Boyd, 174 Wn.2d 470, 275 P.3d 321 (2012). 26, 27

State v. Bruch, 182 Wn.2d 854, 346 P.3d 724 (2015) 25, 26, 27

State v. Coristine, 177 Wn.2d 370, 300 P.3d 400 (2013) 22

<u>State v. Hieb</u> , 107 Wn.2d 97, 727 P.2d 239 (1986)	15
<u>State v. Jasper</u> , 174 Wn.2d 96, 271 P.3d 876 (2012).....	11, 22
<u>State v. Kalebaugh</u> , 183 Wn.2d 578, 355 P.3d 253 (2015).....	16, 18
<u>State v. Kronich</u> , 160 Wn.2d 893, 161 P.3d 982 (2007).....	11, 15
<u>State v. Lamar</u> , 180 Wn.2d 576, 327 P.3d 46 (2014)	17
<u>State v. Nolan</u> , 141 Wn.2d 620, 8 P.3d 300 (2000)	27
<u>State v. Schwab</u> , 163 Wn.2d 664, 185 P.3d 1151 (2008)	15
<u>State v. Scott</u> , 110 Wn.2d 682, 757 P.2d 492 (1988).....	11
<u>State v. Shafer</u> , 156 Wn.2d 381, 128 P.3d 87 (2006)	19
<u>State v. Wilcoxon</u> , 185 Wn.2d 324, 373 P.3d 224 (2016)	9

Washington Court of Appeals Cases

<u>Matter of Villaluz</u> , No. 73782-1-I, 2016 WL 3269718 (Wash. Ct. App. June 13, 2016).....	26, 27
<u>State v. Fraser</u> , 170 Wn. App. 13, 282 P.3d 152 (2012).....	13, 20
<u>State v. Hart</u> , No. 47069-1-II, 2016 WL 4366948 (Wash. Ct. App. Aug. 16, 2016)	14, 15
<u>State v. Hudlow</u> , 182 Wn. App. 266, 331 P.3d 90 (2014)	19
<u>State v. O’Cain</u> , 169 Wn. App. 228, 279 P.3d 926 (2012)	12, 13, 18
<u>State v. Sinclair</u> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	27, 28

Constitutional Provisions

Const. art. I, § 22.....	8
U.S. Const. amend. VI	8

Statutes

RCW 10.73.160(1)..... 27
RCW 46.61.024 4
RCW 69.50.401(2)(b)..... 4, 26
RCW 69.50.4013(1)..... 4
RCW 9.94A.505(5)..... 25
RCW 9.94A.701(9)..... 26, 27
RCW 9A.20.021(b)..... 26
RCW 9A.36.031(1)..... 4

Rules

GR. 14.1(a)..... 26
RAP 14.2..... 27
RAP 15.2(f)..... 28
RAP 2.5(a) 11
RAP 2.5(a)(3)..... passim
RAP 2.5(c)(2)..... 10, 15, 16

A. INTRODUCTION

A Washington appellate court is “not obliged to perpetuate its own error.” Roberson v. Perez, 156 Wn.2d 33, 42, 123 P.3d 844 (2005). In 2015, this Court refused to hear Alan Nord’s confrontation clause challenge for the first time on appeal, incorrectly ruling that confrontation clause violations are always forfeited if not specifically raised in the trial court. But RAP 2.5(a)(3) permits appellants to raise manifest constitutional errors, including violations of the constitutional right to confrontation, as a matter of right for the first time on appeal. Because this Court’s decision was clearly erroneous and the decision works a manifest injustice upon Mr. Nord, this Court should address the claim in this second appeal following remand. On the merits, because Mr. Nord’s right to confrontation was violated through the admission of testimonial hearsay from an absent government informant, this Court should reverse and remand for a new trial. Alternatively, this Court should order the 12-month term of community custody stricken because when combined with Mr. Nord’s term of confinement, it exceeds the statutory maximum.

B. ASSIGNMENTS OF ERROR

1. In violation of the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington Constitution, Mr. Nord

was deprived of his right to confrontation through the admission of testimonial hearsay.

2. The court erred in instructing the jury on accomplice liability. Supp. CP __ (sub. no. 36) (Instruction No. 8); Supp. CP __ (sub. no. 36) (Instruction No. 12).

3. In violation of RCW 9.94A.701(9), the court erred in imposing a term of community custody that, when combined with the term of confinement, exceeds the statutory maximum of the offense.

C. ISSUES

1. As a matter of right, an appellant may raise manifest constitutional error for the first time on appeal. RAP 2.5(a)(3). Violation of a criminal defendant's constitutional right to confrontation may qualify as manifest constitutional error. Still, in the first appeal, this Court refused to consider Mr. Nord's argument that his confrontation rights were violated, ruling that confrontation violations can never be adjudicated for the first time on appeal. This ruling is clearly erroneous and works a manifest injustice upon Mr. Nord. Applying the rule that an appellate court may review the propriety of an earlier decision of the appellate court in the same case, should this Court now address Mr. Nord's argument that his confrontation rights were violated?

2. In general, testimonial statements from an absent witness are inadmissible under the confrontation clause provisions of the Sixth Amendment and article I, § 22. An out-of-court statement from an absent government informant to a defendant about a controlled drug buy is testimonial. As part of a controlled drug buy, an informant—who was working for the government in exchange for leniency—made statements to Mr. Nord over the phone in the presence and at the behest of a police detective. Though the informant did not testify, his out-of-court testimonial statements were admitted. Did the admission of this testimonial hearsay violate Mr. Nord’s right to confrontation?

3. Trial courts must reduce terms of community custody to avoid a sentence in excess of the statutory maximum. The statutory maximum for delivery of a controlled substance, methamphetamine, is 10 years. The trial court sentenced Mr. Nord to 10 years of confinement for delivery of methamphetamine and also imposed 12 months of community custody. Did the trial court err, requiring remand to strike the unlawful term of community custody?

D. STATEMENT OF THE CASE

The State charged Alan Nord with delivery of a controlled substance, methamphetamine;¹ possession of a controlled substance, methamphetamine;² attempting to elude a pursuing police vehicle;³ and third degree assault.⁴ CP 6-7.

According to testimony from law enforcement, the Bellingham Police Department attempted to conduct a controlled buy of methamphetamine from Mr. Nord on April 10, 2013. RP 152, 181.⁵ Detective William Medlen testified that he was working with an informant named Brad Cave. RP 180, 201. In exchange for leniency in an investigation against him, Mr. Cave agreed to help police gather evidence and successfully prosecute other people. RP 195-97. Absent Mr. Cave's cooperation, he faced possible imprisonment. RP 209. As part of his "contract," Mr. Cave understood that he could be called to court to testify. RP 209.

¹ RCW 69.50.401(2)(b).

² RCW 69.50.4013(1).

³ RCW 46.61.024.

⁴ RCW 9A.36.031(1)(a), (g).

⁵ Unless otherwise noted, citations to the transcripts refer to the 2013 proceedings. These consist of proceedings held on July 8, 9, 10, 11 and August 6, 2013.

Around noon on April 10, 2014, Mr. Cave made a call. RP 181. Detective Medlen, also present, put his ear up to the receiver and listened in. RP 181-82. He claimed to recognize the voice on the other end of the phone as Mr. Nord's. RP 182. Over Mr. Nord's hearsay objection, Detective Medlen testified that Mr. Cave told Mr. Nord that he was interested in buying a quarter-ounce of methamphetamine. RP 182-83. According to Detective Medlen, Mr. 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 Mr. Cave's residence. RP 183. The police did not search the residence before the meeting. RP 204.

Law enforcement set up surveillance around the residence, but they could not see the entry into the home, which was at the back of the building. RP 185, 187, 216. After Mr. Cave entered his home, Detective Medlen saw a Honda enter the driveway leading to the home. RP 187. Police believed that Mr. Nord would be in a Honda. RP 155. Detective Medlen could not see beyond the driveway to the residence. RP 210, 216. Similarly, the surveillance team was unable to see Mr. Cave. RP 205. About 15 minutes after arriving, the Honda left the driveway. RP 179, 188, 210.

A police chase ensued. RP 43-44. Ultimately, the police stopped the Honda and arrested the driver, Mr. Nord. RP 64, 123-24. Two adult passengers, a man and a woman, were in the car. RP 65.

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

Following the impoundment of the Honda, the police found a bag containing methamphetamine on the floor of the car. RP 101, 157. They also found a wallet on the floor of the car. RP 160. The wallet contained Mr. Nord's identification and \$130. RP 160, 193. Only a \$20 bill in the wallet matched one of the bills supplied to Mr. Cave by Detective Medlen. RP 194-95. Detective Medlen testified he did not know what happened to the other \$240. RP 207.

At trial, the State did not call Mr. Cave. Rather, over Mr. Nord's hearsay objection, Detective Medlen was permitted to testify as to what

Mr. Cave said to Mr. Nord on the phone. RP 182-83. Based on Mr. Cave's statements, and over Mr. Nord's objection, the court instructed the jury on accomplice liability. RP 262-64. The jury found Mr. Nord guilty of the two drug charges and of attempting to elude a pursuing police vehicle, but acquitted him of the charge of third degree assault.⁶ CP 57-58.

Mr. Nord appealed. In 2015, this Court affirmed the drug convictions, but reversed the conviction for attempting to elude a pursuing police vehicle. CP 24; State v. Nord, 186 Wn. App. 1032 (2015), review denied, 184 Wn.2d 1002, 357 P.3d 665 (2015). This Court refused to address Mr. Nord's argument that Mr. Cave's statements were admitted in violation of his right to confrontation. CP 32-35. As for the eluding conviction, that conviction was reversed because the charging document omitted an essential element. CP 35-39. Because the facts related to the eluding were cited by the trial judge in sentencing Mr. Nord to the maximum of 10 years confinement on the delivery conviction, RP 343-44, this Court remanded for resentencing. CP 39.

At resentencing, the State again asked for the maximum sentence of 10 years. 2/10/16RP 36-37. Mr. Nord, noting that he had been

⁶ The third degree assault charge was premised on Mr. Nord's driving the Honda while law enforcement tried to push the Honda off the road. RP 287-88.

attending programs to better himself while incarcerated and that the convictions involved a small amount of drugs, asked for a mid-range sentence of 90 months (7 and a half years). 2/10/16RP 37-38, 41-47. The court, though commending Mr. Nord for his efforts to improve himself, nevertheless imposed the same sentence of 10 years. CP 56; 2/10/16RP 48. Over Mr. Nord's objection, the court ordered 12 months of community custody on top of the 10-year sentence. 2/10/16RP 57; CP 57. Mr. Nord appeals again.

E. ARGUMENT

1. The admission of testimonial statements made by an absent government informant violated Mr. Nord's confrontation rights under the Sixth Amendment and article I, § 22.

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

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution, guarantee criminal defendants the right to confront and cross-examine witnesses. U.S. Const. amend. VI;⁷ Const. art. I, § 22.⁸

⁷ Under the Sixth Amendment, the accused has the "right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

⁸ Article I, section 22 provides that in "criminal prosecutions the accused shall have the right . . . to meet the witnesses against him face to face" Const. art. I, § 22.

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). Whether the admission of statements violate a defendant’s confrontation rights is a constitutional question reviewed de novo. State v. Wilcoxon, 185 Wn.2d 324, 329, 373 P.3d 224 (2016).

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).

b. In the first appeal, this Court erred by refusing to review Mr. Nord’s confrontation right claim. To correct this injustice, this Court may now properly review the claim.

In the first appeal, this Court refused to hear Mr. Nord’s argument that his right to confrontation was violated, ruling that any error had been

forfeited because there was no confrontation clause objection below. This was error. Applying the rules of appellate procedure, this Court may now reach a different result.

Because this is the second appeal in the same case following a remand, the law of the case doctrine applies. The “law of the case doctrine stands for the proposition that once there is an appellate holding enunciating a principle of law, that holding will be followed in subsequent stages of the same litigation.” Roberson v. Perez, 156 Wn.2d 33, 41, 123 P.3d 844 (2005). The Rules of Appellate Procedure, however, provide an exception and permit this Court to review the propriety an earlier decision and decide differently:

Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

...

(2) *Prior Appellate Court Decision.* The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court’s opinion of the law at the time of the later review.

RAP 2.5(c)(2).

This provision “codifies at least two historically recognized exceptions to the law of the case doctrine that operate independently.”

Roberson, 156 Wn.2d at 42. First, “the doctrine may be avoided where the prior decision is clearly erroneous, and the erroneous decision would work a manifest injustice to one party.” Id. Second, “the doctrine may also be avoided where there has been an intervening change in controlling precedent between trial and appeal.” Id.

“Constitutional errors are treated specially because they often result in serious injustice to the accused.” State v. Scott, 110 Wn.2d 682, 686, 757 P.2d 492 (1988). Thus, under RAP 2.5(a)(3),⁹ manifest error affecting a constitutional right may be raised for the first time on appeal as a matter of right. State v. Blazina, 182 Wn.2d 827, 833, 344 P.3d 680 (2015) (“The text of RAP 2.5(a) clearly delineates three exceptions that allow an appeal as a matter of right.”). This includes the right to confrontation under our state and federal constitutions. State v. Kronich, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007) (overruled on other grounds by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012)); In re Disciplinary

⁹ The rule provides:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

RAP 2.5(a).

Proceeding Against Sanai, 177 Wn.2d 743, 762, 302 P.3d 864 (2013) (“A confrontation clause error can be raised for the first time on appeal in a criminal case under the manifest error rule because the confrontation clause is a constitutional protection that clearly applies at the trial of a criminal defendant.”).

Precedent and RAP 2.5(a)(3) notwithstanding, this Court held that Mr. Nord could not raise his confrontation clause claim for the first time on appeal. CP 32-35. The Court’s decision was premised on State v. O’Cain, 169 Wn. App. 228, 279 P.3d 926 (2012). In O’Cain, this Court reasoned that under controlling United States Supreme Court precedent, a failure to assert the right to confrontation at or before trial results in the right being forfeited. O’Cain, 169 Wn. App. at 248. The O’Cain court explained that if the rule were otherwise, the trial judge would be placed in the untenable position of intervening on the defendant’s behalf to secure a defendant’s confrontation rights when there may be a strategic decision to not invoke them. Id. at 243-44.

O’Cain premised its forfeiture rule on the United States Supreme Court’s decision in Melendez-Diaz, which recognizes States may adopt procedural rules governing confrontation clause objections:

The right to confrontation may, of course, be waived, including by failure to object to the offending evidence;

and States may adopt procedural rules governing the exercise of such objections.

Melendez-Diaz v. Massachusetts, 557 U.S. 305, 314 n.3, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009). O’Cain reasons that an appellate court violates United States Supreme Court precedent by considering a Sixth Amendment confrontation clause challenge for the first time on appeal and that the Washington Supreme Court’s decision in Kronich was overruled in this respect. O’Cain, 169 Wn. App. at 248.

This Court was wrong in holding that the United States Supreme Court nullified RAP 2.5(a)(3)’s application to confrontation clause challenges. RAP 2.5(a)(3) is a procedural rule that allows defendants to raise confrontation clause violations for the first time on appeal if there is manifest error. See State v. Fraser, 170 Wn. App. 13, 26-27, 282 P.3d 152 (2012) (recognizing that RAP 2.5(a) may be a procedural rule governing whether confrontation clause challenges may be considered for the first time on appeal). The States have authority to enact procedural rules governing waiver and forfeiture, and the United States Supreme has no authority to nullify these rules. See Danforth v. Minnesota, 552 U.S. 264, 289, 128 S. Ct. 1029, 169 L. Ed. 2d 859 (2008) (“While we have ample authority to control the administration of justice in the federal courts—particularly in their enforcement of federal legislation—we have no

comparable supervisory authority over the work of state judges.”). Thus, in Danforth, the United States Supreme Court held that state courts were free to apply the “new rule” from Crawford retroactively, even though it would not be applied retroactively in federal courts. Id. at 266. This is consistent with the fundamental concept of “Our Federalism,” which recognizes the “longstanding public policy against federal court interference with state court proceedings.” Younger v. Harris, 401 U.S. 37, 43-44, 91 S. Ct. 746, 27 L. Ed. 2d 669 (1971).

Moreover, O’Cain’s theory is inconsistent with the procedural history of Michigan v. Bryant, 562 U.S. 344, 131 S. Ct. 1143, 179 L. Ed. 2d 93 (2011). There, the United States Supreme Court reviewed a confrontation clause error that had not been preserved in a Michigan trial court. The Michigan Supreme Court addressed the issue for the first time on appeal under a “plain error” standard and held the defendant’s right to confrontation was violated. Bryant, 562 U.S. at 351. The United States Supreme Court reversed, not because the state court had addressed a “forfeited” confrontation clause issue, but because the statements at issue were not testimonial. Id. at 349.

Recently, a panel on Division Two of this Court declined to follow O’Cain. State v. Hart, No. 47069-1-II, 2016 WL 4366948, at *4 n.3. (Wash. Ct. App. Aug. 16, 2016). In doing so, the Court explained that the

Washington Supreme Court has held “that a defendant may raise an alleged confrontation violation for the first time on appeal if the defendant meets the requirements of RAP 2.5(a)(3).” Id. (citing State v. Hieb, 107 Wn.2d 97, 104-08, 727 P.2d 239 (1986)). The Washington Supreme Court in Hieb held that the Court of Appeals had properly allowed the defendant to raise a confrontation clause claim for the first time on appeal. Hieb, 107 Wn.2d at 108. Unconvinced that United States Supreme Court precedent compelled a different result, the Hart court reasoned it would “adhere to our Supreme Court’s binding decision in *Hieb* until and unless our Supreme Court overrules it and holds that confrontation clause claims per se may not be raised for the first time on appeal.” Hart at *4 n.3. The Hart court then analyzed the claim under RAP 2.5(a)(3).

As in Hieb, Kronich, and Hart, this Court should have reviewed the confrontation clause issue under RAP 2.5(a)(3). RAP 2.5(c)(2) “assures that an appellate court is not obliged to perpetuate its own error.” Roberson, 156 Wn.2d at 42. This Court should review the propriety of its earlier decision on RAP 2.5(a)(3) because that decision was clearly erroneous and is inconsistent with binding Washington Supreme Court precedent and a recent opinion from this Court. See, e.g., State v. Schwab, 163 Wn.2d 664, 673-74, 185 P.3d 1151 (2008) (Court of Appeals properly revisited earlier decision due to clear error). Further, review is warranted

because the erroneous decision works a manifest injustice against Mr. Nord. Cf. id. at 674 (Court of Appeals’ decision in revisiting issue served interests of justice because it ensured appropriate punishment). As argued, Mr. Nord’s convictions were obtained in violation his constitutional right to confront the witnesses against him, depriving him of a fair trial and resulting in 10 years of confinement. Because RAP 2.5(c)(2) is satisfied, this Court should address Mr. Nord’s confrontation claim on the merits.

c. The admission of testimonial hearsay from the absent government informant was manifest constitutional error that is properly addressed for the first time on appeal.

A RAP 2.5(a)(3) analysis asks: “(1) Has the party claiming error shown the error is truly of a constitutional magnitude, and if so, (2) has the party demonstrated that the error is manifest?” State v. Kalebaugh, 183 Wn.2d 578, 583, 355 P.3d 253 (2015). The first part of this test is met because the issue is plainly constitutional.

The second part of the test is satisfied when the error is manifest from the record. This means there is a showing of “actual prejudice.” Id. (internal quotation and citation omitted). There is actual prejudice when “the asserted error had practical and identifiable consequences.” Id. (internal quotation and citation omitted). The appellate court determines this by placing itself in the place of the trial court and ascertains if the trial

court could have corrected the error. Id. For example, a jury instruction misstating the law on the meaning of “beyond a reasonable doubt” qualified because “the trial court should have known” this was a misstatement. Id.

This analysis should “not be confused with the requirements for establishing an actual violation of a constitutional right or for establishing lack of prejudice under a harmless error analysis if a violation of a constitutional right has occurred.” State v. Lamar, 180 Wn.2d 576, 583, 327 P.3d 46 (2014). The rule “serves a gatekeeping function that will bar review of claimed constitutional errors to which no exception was made unless the record shows that there is a fairly strong likelihood that serious constitutional error occurred.” Id.

Here, Mr. Cave, an absent government informant, did not testify at trial. Over Mr. Nord’s hearsay objection, Detective Medlen was permitted to testify as to what Mr. Cave said to Mr. Nord on the phone. RP 182-83. Based on Mr. Cave’s statements, the State obtained an accomplice liability instruction over Mr. Nord’s objection. RP 262-64. The prosecutor also emphasized Mr. Cave’s statements during closing. RP 280. Thus, “the asserted error had practical and identifiable consequences” in Mr. Nord’s trial. Lamar, 180 Wn.2d at 585.

Further, “the error was apparent at the time it occurred.” Id. at 586. While not raising a confrontation clause objection, Mr. Nord’s hearsay objection permitted the trial court to correct to error. When a defendant makes a hearsay objection to testimony about what an absent government informant said, alarm bells should be ringing in the trial judge’s mind that the defendant’s confrontation rights are implicated. Similar to Kalebaugh, the trial court should have recognized the constitutional error. The policy concern expressed in O’Cain that a trial judge may interfere with defense strategy by intervening is not present when the defendant seeks exclusion of the evidence on other grounds. Here, Mr. Nord objected and sought to exclude the statements as inadmissible hearsay under the rules of evidence. Thus, the trial court would have not been interfering with any defense strategy in excluding what the government informant said.

Because the requirements of RAP 2.5(a)(3) are met, this Court should review the claimed error.

d. The informant’s statements were testimonial hearsay.

Testimonial statements include statements that a declarant would reasonably expect to be used prosecutorially and 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. Crawford, 541 U.S. at 51-52. 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). On whether an informant’s statements to a defendant during a controlled buy qualifies as testimonial under these definitions, this Court has answered yes:

Under the circumstances of a controlled buy, a reasonable confidential informant would believe his or her statement would further police investigations towards future criminal prosecutions and specifically that such statements would be available for use at a later trial.

State v. Hudlow, 182 Wn. App. 266, 283, 331 P.3d 90 (2014) (internal quotation omitted).

Here, Detective Medlen testified to the contents of the informant’s telephone conversation with Mr. 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 Detective Medlen, Mr. 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. Detective Medlen then testified that Mr. Cave asked to meet Mr. Nord in public, but later agreed to meet at Mr. Cave's residence. See RP 183.

As in Hudlow, Mr. Cave's statements qualified as testimonial. Mr. 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 Mr. Nord. As part of his "contract" with police, Mr. Cave understood that he could be called to court to testify. RP 209. A reasonable person in Mr. Cave's position would expect that his statements to Mr. Nord—about buying a quarter-ounce of methamphetamine—would be used by the prosecution at trial.

The confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." Crawford, 541 U.S. at 60 n. 9 (citing Tennessee v. Street, 471 U.S. 409, 414, 105 S. Ct. 2078, 85 L. Ed. 2d 425 (1985)); Fraser, 170 Wn. App. at 21. However, merely because a statement has a non-hearsay purpose "does not save it from confrontation clause analysis." Fraser, 170 Wn. App. at 23.

Here, while Mr. Cave's out-of-court statements arguably had the non-hearsay purpose of providing "context" to what Mr. Nord himself said

on the phone,¹⁰ they also were also used substantively for the truth of the matter asserted, *i.e.*, that the informant wanted to meet to buy a quarter-ounce of methamphetamine. The State used the informant's statements to obtain an accomplice liability instruction over Mr. Nord's objection. RP 262-64; Supp. CP __ (sub. no. 36) (Instructions No. 8 and 12). And during closing, the prosecutor drew the jury's attention to the amount of methamphetamine requested by the informant, *a quarter-ounce*, and the amount the informant obtained, also a *quarter-ounce*. RP 280 ("He set up a deal for a quarter ounce himself over the phone. Gee, what a coincidence and the quarter ounce was delivered . . ."). Thus, there is no doubt that the testimonial statements were used to prove the truth of the matter asserted. Cromer, 389 F.3d at 678 n.10 (prosecutor's closing argument resolved any potential doubt on whether statements were used for the truth of the matter asserted).

This Court should hold that the out-of-court statements made by Mr. Cave admitted at trial were testimonial hearsay that violated Mr. Nord's right to confrontation under the state and federal constitutions.

¹⁰ In the first appeal, this Court rejected Mr. Nord's argument that the trial court erred in overruling Mr. Nord's hearsay objection, reasoning the statements had the non-hearsay purpose of providing context to Mr. Nord's statements. CP 31-32.

e. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

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 untainted evidence against Mr. Nord was weak and the State's accomplice liability theory was based on the erroneously admitted testimonial statements from Mr. Cave, the State cannot meet its burden to prove the error was harmless.

No witness testified about what happened in Mr. Cave's residence. No witness testified that Mr. Nord entered Mr. Cave's home. Although the State might have called Mr. Cave to testify about how he obtained the methamphetamine, he was not called. 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 Mr. Cave's driveway and that it later left the same

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 the testimonial hearsay that Mr. Cave wanted to buy a quarter-ounce of methamphetamine from Mr. Nord, the evidence would not have established that Mr. Nord met Mr. Cave to facilitate a drug transaction. And without the statement, the *amount* of methamphetamine Mr. Cave handed over to Detective Medlen, *a quarter-ounce*, would not have linked Mr. Nord to the delivery. The statement showed that Mr. Cave had received the same amount of methamphetamine that he had requested on the phone. It provided the jury with a strong link between Mr. Nord and the methamphetamine recovered from Mr. Cave.

The testimonial hearsay was also used, over Mr. Nord's objection, to justify an accomplice liability instruction on the delivery charge. RP 262-64; Supp. CP __ (sub. no. 36) (Instructions No. 8 and 12). Mr. Nord's complicity was premised primarily on the testimonial hearsay evidence from Mr. Cave. RP 263. The State used the accomplice liability instruction to argue that while it was unknown who physically delivered the methamphetamine to Mr. Cave, it did not matter because Mr. Nord must have at least acted as 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 Supp. CP __ (sub. no. 36) (Instructions No. 8 and 12) (telling jury Mr. Nord was guilty if he 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 may argue that any error was harmless in light of a jail call recording admitted at trial. Ex. 15.¹¹ In the recording, Mr. Nord states that he had some interaction with a person named “Brad” (possibly 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 Mr. Nord essentially confessed to delivering a controlled

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

substance to Mr. Cave. But Mr. Nord did not confess to any charges. In fact, he referred to the charges as “trumped up” on the recording. Ex. 15. Regardless, given the prosecutor’s closing argument and the accomplice liability instruction, the State cannot show that the error did not contribute to the verdict.

The testimonial hearsay was crucial evidence in establishing that Mr. Nord was guilty of the drug charges. No other evidence established what Mr. Cave’s testimonial statements established. Because the State cannot meet its burden to prove the error harmless beyond a reasonable doubt, this Court should reverse Mr. Nord’s convictions for delivery and possession of a controlled substance.

2. When combined with the term of confinement, the term of community custody exceeds the statutory maximum of the offense. Because this is unlawful, remand for correction of the judgment and sentence is required.

Interpretation of the Sentencing Reform Act is an issue of law reviewed *de novo*. State v. Bruch, 182 Wn.2d 854, 859, 346 P.3d 724 (2015).

In general, “a court may not impose a sentence providing for a term of confinement or community custody that exceeds the statutory maximum for the crime as provided in chapter 9A.20 RCW.” RCW 9.94A.505(5). The Legislature has further instructed that a “term of

community custody” “shall be reduced by the court whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.” RCW 9.94A.701(9).

Accordingly, trial courts must reduce terms of community custody to avoid a sentence in excess of the statutory maximum. Bruch, 182 Wn.2d at 858; State v. Boyd, 174 Wn.2d 470, 473, 275 P.3d 321 (2012). To fail to do so is error. See, e.g., Matter of Villaluz, No. 73782-1-I, 2016 WL 3269718, at *1 (Wash. Ct. App. June 13, 2016) (trial court erred in imposing a 12-month term of community custody in addition to the 120-month term of confinement, which was the statutory maximum for the offense).¹²

Similar to Villaluz, the court sentenced Mr. Nord to 120 months of confinement for delivery of a controlled substance, methamphetamine. CP 57. This is the statutory maximum. RCW 69.50.401(2)(b); RCW 9A.20.021(b). By doing so, the court was required under RCW 9.94A.701(9) to reduce his term of community custody to zero.

¹² GR. 14.1(a) (“unpublished opinions of the Court of Appeals filed on or after March 1, 2013, may be cited as nonbinding authorities, if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate.”).

The court, however, imposed 12 months of community custody on top of 120 months of confinement. CP 57. The court refused to comply with RCW 9.94A.701(9), instead writing on the judgment and sentence that “community custody to be imposed only if defendant is released from prison early so there is still time available to serve on community custody.” CP 57. This notation does not cure the error. It improperly requires the Department of Correction to monitor Mr. Nord’s sentence to ensure that he does not serve a term of community custody that exceeds the statutory maximum. See Bruch, 182 Wn.2d at 864; Boyd, 174 Wn.2d at 473. As in Villaluz, the sentencing court erred.

This Court should accordingly reverse and remand with instruction to eliminate the term of community custody.

3. No costs should be imposed for this appeal.

If Mr. Nord does not substantially prevail in this appeal, the State may request appellate costs. RCW 10.73.160(1); RAP 14.2. This Court has discretion under RAP 14.2 to decline an award of costs. State v. Nolan, 141 Wn.2d 620, 626, 8 P.3d 300 (2000); State v. Sinclair, 192 Wn. App. 380, 388, 367 P.3d 612 (2016). This means “making an individualized inquiry.” Sinclair, 192 Wn. App. at 391 (citing Blazina, 182 Wn.2d at 838). A person’s ability to pay is an important factor. Id. at 389.

Here, Mr. Nord was found to be indigent. Supp. CP __ (sub. no. 110, 111). This creates a presumption of indigency that continues on appeal. RAP 15.2(f); Sinclair, 192 Wn. App. at 393. The trial court further recognized this indigency by waiving discretionary legal financial obligations. CP 58; 2/10/16RP 46. Given this record, the Court should exercise its discretion and reject any request for costs. Cf. Sinclair, 192 Wn. App. at 392-93 (declining State's request for costs in light of defendant's indigency and lack of evidence or findings showing that defendant's financial situation would improve).

F. CONCLUSION

Mr. Nord's constitutional right to confront the witnesses against him was violated through the admission of testimonial hearsay of an absent government informant. This manifest constitutional error warrants review and demands reversal of Mr. Nord's convictions. Alternatively, this Court should remand with instruction to eliminate the term of community custody.

DATED this 10th day of October, 2016.

Respectfully submitted,

/s Richard W. Lechich
Richard W. Lechich – WSBA #43296
Washington Appellate Project
Attorney for Appellant

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

STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 74767-3-I
)	
ALAN NORD,)	
)	
APPELLANT.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 10TH DAY OF OCTOBER, 2016, 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:

- | | | | |
|------|---|-------------------|--|
| [X] | DONNA BRACKE
WHATCOM COUNTY PROSECUTOR'S OFFICE
[Appellate_Division@co.whatcom.wa.us]
311 GRAND AVENUE
BELLINGHAM, WA 98225 | ()
()
(X) | U.S. MAIL
HAND DELIVERY
AGREED E-SERVICE
VIA COA PORTAL |
| [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 10TH DAY OF OCTOBER, 2016.

X _____ 

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