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Washington State Constitution

Article I, §22	16
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A. ASSIGNMENTS OF ERROR

1. The trial court erred by entering CrR 3.5 conclusion of law II, III, and IV.

Conclusion of law II states, “[t]hat the defendant made a knowing and intelligent waiver of her Miranda rights.”

Conclusion of law III states, “[t]hat no threats or promises were made to the defendant to get her to waive those rights.”

Conclusion of law IV states in relevant part, “[t]hat the defendant’s statements, including ‘I sell methamphetamine to survive’ [is] admissible, subject to other evidentiary objections, if any.”

2. The trial court erred by admitting hearsay testimony of Officer Bernsten, and denying defense counsel’s motion to strike said testimony.

3. The State presented insufficient evidence from which a rational trier of fact could find Ms. Moore guilty of possession of a controlled substance.

4. The cumulative error doctrine deprived Ms. Moore of a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the totality of the circumstances has the State overcome the presumption of involuntariness in a confession where four to five police are present, threats of prison are made, and weapons are drawn?

2. Did the trial court violated Ms. Moore's constitutional right to confrontation by admitting testimonial hearsay?

3. In order to obtain a conviction, State must prove beyond a reasonable doubt each element of the charge of possession of a controlled substance. Where, here, the evidence did not indicate where the drugs were possessed, has the State proved every element of the charged offense beyond a reasonable doubt?

4. Was Ms. Moore denied a fair trial due to cumulative error?

C. STATEMENT OF THE CASE

Ada Moore was charged by First Amended Information with two counts of Delivery of Methamphetamine, one count of Possession of Methamphetamine, and one count of Possession of Marijuana. Count III was a single count of Possession of Methamphetamine alleged to have occurred on or about November 16, 2004. The charges stemmed from Ms. Moore alleged involvement in drug transactions on November 8th and 11th

2004, and a search of her home on November 16, 2004 executed following law enforcement's obtaining a search warrant. VRP 90, 93, 98, 100-106, 115-119, 122-28.

The case proceeded to trial in August of 2005, and a jury convicted Ms. Moore of Count III only, and found her not guilty of all other counts against her. This timely appeal followed.

Ada Moore was the target of controlled buys occurring on November 8 and 11, 2004. VRP 92, 115. Law enforcement used a confidential informant named Jay McNeal to execute these controlled buys. VRP 98. On November 12, 2004 law enforcement obtained a search warrant for Ms. Moore's home, and it was executed on November 16, 2004. VRP 121-22. A total of 12 or 13 law enforcement personnel assisted in the execution of the warrant including members of the Special Operations Group detective, agents from the Naval Criminal Investigative Service, and agents from the Department of Corrections. VRP 122. Law enforcement wore uniforms complete with gear and helmets, and executed the warrant at about 7:25 in the evening of the 16th. VRP 123.

When the warrant was executed, apparently an adult male, Ms. Moore, and a child were present in the home. VRP 123. Detective Plumb arrested her for delivery of a controlled substance and she allegedly made the statement "I sell methamphetamine to survive" to him. VRP 125.

The statement "I sell methamphetamine to survive" was the subject of a lengthy 3.5 hearing where Ms. Moore took the stand. See generally VRP 31-53. Ms. Moore denied making this statement. VRP 44. She was frightened and described the situation as demeaning. VRP 45. There was confusion in the house with numerous law enforcement in uniform, her dog barking, and generally a lot of commotion. VRP 45-46. Ms. Moore testified that her Miranda warnings were not read to her. VRP 46. During this confused scene, law enforcement were trying to get Ms. Moore to work for them. VRP 35-36. Detective Plumb could not exactly recall if her alleged-statement about "selling meth to survive" came before or after the offer to work or cooperate. VRP 36. He testified that this question about cooperation is usually asked up front at the get go of the search warrant execution. VRP 36-37. Detective Plumb wore a police shirt, police helmet, police duty gear, with the word "Police" on those things, and all officers that night were wearing similar gear. VRP 35. It is more than likely weapons were drawn when they went in. VRP 35. Ms. Moore recalled the black attire and weapon drawn and was frightened by it. VRP 44-45. The statement did come in at trial. See VRP 125.

Detective Plumb's involvement in the execution of the search warrant on Ms. Moore's home did not involve him personally searching the house very much. VRP 146. Detective Elton assisted in executing the

search warrant, in terms of initial entry and securing the residence, but did not actually search the house. VRP 168. He assisted in the interview of Ms. Moore. VRP 168. Further, Detective Bernsten assisted in the execution of this search warrant and went through the residence and photographed the entire residence as well as photographing evidence once it was located. VRP 181. There were two NCIS agents who would point items out to him, and then he would photograph them. VRP 182, and see e.g., VRP 186. He did not physically stand by and observe the search, and did not locate himself, and could not recall which items he physically observed when he walked in the room. VRP 198. He had no recollection of finding a little baggie with another baggie inside of it with suspected methamphetamine. VRP 199.

Mr. Mark Strongman of the Washington State Patrol Crime Laboratory testified that the material in exhibits 1, 2, and 13 tested positive for methamphetamine. VRP 291-96. Exhibits 1 and 2 were seized into evidence following the controlled buys in this case, and exhibit 13 was allegedly seized during the search of Ms. Moore's home on November 16th.

D. ARGUMENT

1. THE COURT ERRED IN FAILING TO SUPPRESS MOORE'S ADMISSION WHICH WAS INVOLUNTARY BECAUSE IT WAS COERCED.

An individual has the right to be free from compelled self-incrimination while in police custody. U.S. Const. amends. 5 & 14. Miranda v. Arizona, 384 U.S. 436, 479, 86 S. Ct. 1602, 1630, 16 L. Ed. 694 (1966). There is no presumption in favor of a waiver of a constitutional right; rather courts are to "indulge every reasonable presumption against waiver." State v. Riley, 19 Wn. App. 289, 294, 576 P.2d 1311 (1987) (quoting Barker v. Wingo, 407 U.S. 514, 525, 33 L. Ed. 2d 101, 92 S. Ct. 2182 (1973)).

Once an individual is in police custody, any incriminating statements obtained from that suspect are presumed involuntary. The state bears the heavy burden of overcoming this presumption of involuntariness. North Carolina v. Butler, 441 U.S. 369, 373, 60 L. Ed. 2d 286, 99 S. Ct. 1755 (1978); State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988).

A trial court must find voluntariness by a preponderance of the evidence, and the appellate court will uphold the determination only when there is substantial evidence in the record. State v. Broadaway, 133 Wn.2d 118, 942 P.2d 363 (1997); State v. Ng, 110 Wn.2d 32, 37, 750 P.2d 632 (1988); State v. Vannoy, 25 Wn. App. 464, 467, 610 P.2d 380 (1980),

decision after remand on other grounds, 27 Wn. App. 527, 618 P.2d 1340 (1980), Jurek v. Estelle, 593 F.2d 672, 679 (5th Cir. 1979) (appellate court must carefully scrutinize circumstances surrounding statements).

Before a confession can be voluntary, it must be the product of a rational intellect and a free will. State v. Rupe, 101 Wn.2d 664, 679, 683 P.2d 571, cert. denied, 486 U.S. 1061 (1984). Voluntariness cannot be taken literally to mean a “knowing” choice because even confessions made under brutal treatment would be admissible as representing a knowing choice of alternatives. Schneckloth v. Bustamonte, 412 U.S. 218, 224, 36 L. Ed. 2d 854, 83 S. Ct. 2041 (1973).

There mere fact that Miranda warnings were read does not prove a subsequent confession was voluntary. State v. Prater, 77 Wn.2d 526, 463 P.2d 640 (1970). Likewise, the mere fact that a suspect signed a rights form does not prove voluntariness. Miranda, 384 U.S. at 492. Rather, the “totality of the circumstances” must be considered. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); State v. Ortiz, 104 Wn.2d 479, 484, 706 P.2d 1069 (1985), cert. denied, 476 U.S. 1144, 106 S. Ct. 2255 (1986); Rupe, 101 Wn.2d at 679; State v. Trout, 125 Wn. App. 403, 414 (2005).

The critical inquiry is whether the officers’ actions overcame the defendant’s will to resist. State v. Braun, 82 Wn.2d 157, 161-62, 506 P.2d

742 (1973) (quoting Rogers v. Richmond, 365 U.S. 53, 544, 5 L. Ed. 2d 760, 81 S. Ct. 735 (1961)). Police misconduct need not be shocking before a court will find statements were involuntary. State v. Riley, 17 Wn. App. 732, 735, 565 P.2d 105 (1977). A confession is involuntary when there is a causal connection between police coercion and the confession. State v. Broadaway, 133 Wn.2d 118, 132, 942 P.2d 363 (1997); Colorado v. Connelly, 479 U.S. 157, 165, 93 L. Ed. 2d. 473, 107 S. Ct. 515 (1986).

The test to determine whether a confession is voluntary is “whether the behavior of the State’s law enforcement officials was such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined a question to be answered with complete disregard of whether or not petitioner in fact spoke the truth.” State v. Braun, 82 Wn.2d 157, 161-62, 509 P.2d 742 (1973) (quoting Rogers v. Richmond, 365 U.S. 534, 544, 5 L. Ed. 2d 760, 81 S. Ct. 735 (1961)).

Here, Detective Randy D. Plumb testified at the 3.5 hearing that he was part of the Special Operations Group executing a search warrant at the defendant’s residence. VRP 31-32. Detective Plumb testified that he read Ms. Moore her Miranda rights. VRP 32. Ms. Moore’s testimony was that her rights were not read to her. VRP 45. Detective Plumb testified that Detective Elton was present with him during this, yet Detective Elton was

never called to the stand during the 3.5 hearing to confirm that Miranda warnings were given. See generally VRP 33, 33-53. There were at least four or five officers from the drug unit in the house. VRP 34.

Detective Plumb wore a police shirt, police helmet, police duty gear, with the word "Police" on those things, and all officers that night were wearing similar gear. VRP 35. It is more than likely weapons were drawn when they went in. VRP 35. Ms. Moore recalled the black attire and weapon drawn and was frightened by it. VRP 44-45.

Detective Plumb further frightened Ms. Moore by suggesting that she might be going to jail if she did not cooperate with them. VRP 45. Detective Plumb offered her a favorable recommendation if she were to work with the SOG unit. VRP 35. The question to the defendant concerning cooperation is typically right at the beginning of the interview. VRP 36-37. According to Detective Plumb, in response to questioning, Ms. Moore made the statement that she "sells methamphetamine to survive." VRP 33-34. Detective Plumb conceded that this statement – the issue of the 3.5 hearing – could have been in response to his offer to Ms. Moore to work with him. VRP 36. Furthermore, he could not recall exactly when the statement was made. VRP 36. In addition, he could not recall if he threatened her that she was looking at prison if she didn't want

to cooperate. VRP 37. Ms. Moore recalled Detective Plumb saying “well, you are going to go to prison.” VRP 42.

The suggestion from the 3.5 hearing is that questioning of Ms. Moore occurred right at the “get go” of the execution of the search warrant. See generally VRP 31-53, 36. At no point during the redirect of Detective Plumb did the deputy prosecuting attorney clear up whether guns were drawn when the statement that she “sells methamphetamine to survive” was made. See VRP 53.

Thus, at the conclusion of the 3.5 hearing the following testimony has been elicited: A search warrant is being executed. VRP 31. Four to five officers in full police gear, wearing black gear with the word “police” on it are executing the warrant. VRP 34, 35. Weapons were more than likely drawn. VRP 35. Ms. Moore is threatened with prison if she doesn’t cooperate, and Detective Plumb never denied this threat, rather only could not remember if he had made it. VRP 37, 42, 45. Miranda rights may have or may not have been given. VRP 32, 45.

Under these circumstances, the statement from Ms. Moore cannot be properly classified as an intelligent and knowing waiver of rights. A display of a weapon combined with threats and promises of leniency if Ms. Moore “cooperates” adds up to circumstances where the statement

from Ms. Moore should be deemed inadmissible as not voluntarily made. The trial court erred in admitting this statement.

It is well established that constitutional errors may be so insignificant as to be harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986); Harrington v. California, 395 U.S. 250, 251-52, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969); Chapman v. California, 386 U.S. 18, 21, 17 L. Ed. 2d 705, 87 S. Ct. 824, reh'g denied, 386 U.S. 987 (1967). "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." Guloy, at 425. Certain constitutional errors may never be harmless. See Guloy, at 431-32 (Brachtenbach, J., concurring). For example, the admission of an involuntary confession cannot constitute harmless error. See Guloy, at 432 (Brachtenbach, J., concurring); See also Mincey v. Arizona, 437 U.S. 385, 398, 57 L. Ed. 2d 290, 98 S. Ct. 2408 (1978); Payne v. Arkansas, 356 U.S. 560, 567-68, 2 L. Ed. 2d 975, 78 S. Ct. 844 (1958).

It was not harmless error for the trial court to admit Ms. Moore's statement. This error rose to a constitutional level. The statement did come in at trial. See VRP 125. Furthermore, it highly prejudiced the defense argument of unwitting possession. At closing, defense counsel

argued that Ms. Moore was in unwitting possession of methamphetamine. See VRP 486-87. The entry of the statement that she “sells methamphetamine to survive” vitiates this defense, because it is quite difficult to be in unwitting possession of something that you are selling. Although the jury was not convinced on this occasion that Ms. Moore sold methamphetamine, clearly, her statement could have been used against her vis-a-vis simple possession.

2. THE COURT ERRED BY FAILING TO GRANT DEFENSE COUNSEL’S MOTION TO STRIKE TESTIMONY OF OFFICER BERNTSEN.

The Sixth Amendment provides that “in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. Amend VI. This guarantee applies to the States through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 406, 85 S. Ct. 1965, 13 L. Ed.2d 923 (1965); U.S. Const. Amend. XIV. The essence of the Sixth Amendment’s right to confrontation is the right to meaningful cross-examination of one’s accusers. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 1363, 1369, 158 L.Ed.2d 177 (2004); Delaware v. Van Arsdall, 475 U.S. 673, 678-79, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are

tested. Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974).

Defense counsel made a motion to strike all of Officer Berntsen's testimony about where certain items were found during the execution of a search warrant. VRP 199. The trial court denied this motion, and ruled that Officer Berntsen could properly be cross examined. VRP 201. Officer Berntsen testified that he collected evidence once it was located and he photographed it. VRP 181. Two other agents would assist with the search and point to an item and Officer Berntsen would photograph and transport it out to the evidence processing area in the living room. VRP 182. See also VRP 183, 186, 197, 198, 199.

Officer Berntsen would repeatedly testify that two other agents found evidence items, and pointed them out to him, and he would photograph them. However, the two other agents who actually did find the items did not testify at trial. The Crawford opinion provided no comprehensive definition of "testimonial," but noted that the cord definition of the term included "pretrial statements that declarants would reasonably expect to be used prosecutorially." Crawford, 124 S.Ct. at 1364. Certainly the collection of evidence could be considered something of a testimonial nature. Because Ms. Moore could not cross examine the two officers who actually found evidence used against her at trial, her

Sixth Amendment right to confrontation was violated. Ms. Moore was not afforded any opportunity to cross examine the officers and thus delve into the circumstances of how they were found, where they were found, and so forth.

Because Ms. Moore had no opportunity to cross examine the two officers who actually found evidence used against her, her right to confront was violated. The conviction must be reversed and the case remanded for a new trial.

3. **THE STATE PRESENTED INSUFFICIENT EVIDENCE FOR A RATIONAL FINDER OF FACT TO CONVICT MS. MOORE OF POSSESSION OF A CONTROLLED SUBSTANCE.**

There must be evidence to support each element of the crime charged. The State has the burden of proving each element of the crime charged beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970); Seattle v. Gellein, 112 Wn.2d 58, 62 768 P.2d 470, 775 P.2d 448 (1989). On a challenge to the sufficiency of the evidence, this Court must decide whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of delivery beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn2d 216, 221, 616 P.2d 628 (1980).

When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

The State presented insufficient evidence to prove Ms. Moore committed the offense of possession of a controlled substance on or about November 16, 2004, as alleged in Count III of the First Amended Information.

Detective Randy Plumb testified to the events occurring on November 16, 2004 when a search warrant was executed at Ms. Moore's home. VRP 122-128. He testified that a tin box containing a powder substance was found but had no personal knowledge as to where it was found. 127-28.

Detective Elton testified that he assisted with the execution of the search warrant but not with the actual search of the home. VRP 168. Detective Berntsen testified that he photographed a silver box containing suspected methamphetamine residue which was found by someone else. 181-84, 198. Drug paraphernalia (scales) was also found with a residue suspected to be methamphetamine. 188-190. Detective Berntsen did not personally find any methamphetamine. VRP 257. He had no recollection of finding a small baggie with a baggie inside of it containing suspected methamphetamine (Exhibit 13). VRP 199, 258. He recognized the

methamphetamine from the markings on the bag, which were not his own. VRP 258. Mark Strongman of the Washington State Patrol testified that exhibit 13 tested affirmatively for methamphetamine. 291, 296-97.

Although there appears to be methamphetamine that was entered into evidence in this case, no officer could say with complete certainty where it came from or where it was found during the search of the residence. More than one room was being searched at the same time. VRP 258. Without any testimony indicating where the suspected methamphetamine was found, a rational trier of fact could not have found Ms. Moore guilty of possession of methamphetamine.

4. CUMULATIVE ERROR DEPRIVED MS. MOORE OF A FAIR TRIAL.

Every defendant has the right to a fair trial, which is guaranteed both by the Federal and State Constitutions. U.S. Const. amend 6; Wash. Const. art. 1, § 22. Cumulative trial error may deprive a defendant of this right. State v. Coe, 101 Wn.2d 772, 789, 684 p.2d 668 (1984); State v. Badda, 63 Wn.2d 176, 183, 385 P.2d 859 (1963); State v. Alexander, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

This is precisely what occurred in Ms. Moore's case. Assuming that this Court concludes that the numerous errors do not individually warrant reversal, then the combined effect these errors certainly does.

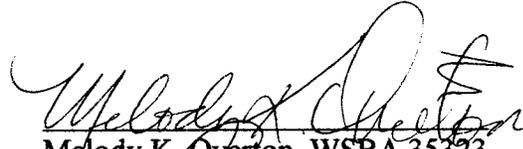
E. CONCLUSION

For the reasons stated herein, this Court should reverse Ms. Moore's conviction.

Respectfully submitted this 11 day of May, 2006.



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Attorney for Appellant



Melody K. Overton, WSBA 35323
Attorney for Appellant

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**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,)
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 Plaintiff,)
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 v.)
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 ADA MOORE,)
)
 Defendant.)

NO. 33812-II-2

AFFIDAVIT OF SERVICE

STATE OF WASHINGTON)
) ss:
COUNTY OF KITSAP)

Kelly Hayes, being first duly sworn on oath, does depose and state:

On May 11, 2006, I sent by U.S. mail, an original and one copy of Appellant's Brief to the Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

On May 11, 2006, I sent by hand delivery a copy of the Appellant's Brief to the appeals clerk, c/o Kitsap County Superior Court, 614 Division Street, Port Orchard, WA 98366.

On May 11, 2006, I sent by hand delivery a copy of the Appellant's Brief to Randall Sutton, Kitsap County Prosecutor's Office, 614 Division Street, Port Orchard, WA 98366.

On May 11, 2006, I sent by U.S. Mail a copy of the Appellant's Brief to defendant, Ada Moore, 4024 Country Lane Road N.W., Space 55, Bremerton, WA 98312.

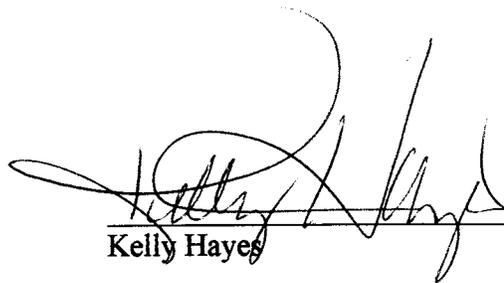
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Kelly Hayes

SUBSCRIBED AND SWORN to before me this 11th day of May, 2006.



Linette Zimmerman, Notary Public in and for
The State of Washington. My Commission
Expires: 12/9/06