

NO 35752-6-II.
Cowlitz County No 05-1-01467-6.

STATE OF WASHINGTON,

Respondent,

vs.

DAPHNE LYNN KRAABELL

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
C7502-6 PM 6/13
BY _____
LCP

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

I. MS. KRAABELL'S CONVICTIONS VIOLATE DOUBLE JEOPARDY.

II. MS. KRAABELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO REQUEST AN INSTRUCTION UNDER WPIC 6.05 PERTAINING TO ACCOMPLICE TESTIMONY.

III. MS. KRAABELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT SENTENCING

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I. MS. KRAABELL'S CONVICTIONS VIOLATE DOUBLE JEOPARDY BECAUSE THE COURT LACKED GOOD CAUSE TO DECLARE A MISTRIAL.

II. MS. KRAABELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO REQUEST AN INSTRUCTION UNDER WPIC 6.05 WHICH WOULD HAVE CAUTIONED THE JURY ABOUT ACCOMPLICE TESTIMONY.

III. MS. KRAABELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO REQUEST AN EXCEPTIONAL SENTENCE DOWNWARD.

C. STATEMENT OF THE CASE

Daphne Lynn Kraabell was charged by Amended Information, dated November 17, 2006, with three counts of delivering methamphetamine and one count of possession of methamphetamine. CP

9.¹ Ms. Kraabell was represented by Ms. Ellavsky (now Ms. Hallin). Report of Proceedings. At the pre-trial readiness hearing on November 16, 2006, the parties appeared to be under the impression that the jury trial, scheduled for November 20, 2006, would be bumped in favor of another trial. I RP 14. However, they were informed by the court that circumstances had changed and that Ms. Kraabell's case would, in fact, proceed to trial on November 20th. I RP 15.

The prosecutor expressed concern because he had canceled his subpoenas, and the court told him to call his witnesses and advise them the trial would proceed. I RP 15. The prosecutor also expressed concern that he would not be able to contact the defendant's witnesses in enough time to prepare for trial. I RP 15-16.

Ms. Ellavsky did not express any particular concern that she would be unable to prepare her case, but noted for the court that the parties had agreed to an alternate trial date of December 6, 2006, "if need be." I RP 16. The court set another review the following day to make sure the parties were prepared. I RP 15.

At the hearing on November 17, 2006, Ms. Ellavsky informed the court that she had failed to advise Ms. Kraabell that she was planning to

¹ A separate count of delivery of methamphetamine, alleged to have occurred on November 23, 2005, was initially charged under a separate cause number and joined for trial with the counts under this cause number. Prior to the second trial, the State placed the separate delivery count on the same Information under this cause number. CP 34-35.

return to her previous job as a deputy prosecutor with the Cowlitz County Prosecutor's Office. I RP 17. In fact, Ms. Kraabell's prior attorney in this case, Michael Evans, withdrew from her case because he also returned to work as a deputy prosecutor with the Cowlitz County Prosecutor's Office. I RP 17. Ms. Kraabell requested that a new attorney be appointed to represent her because she was concerned not only about Ms. Ellavsky's failure to inform of this potential conflict, but because she felt that Ms. Ellavsky's interests were contrary to hers in that Ms. Ellavsky might fail to provide zealous advocacy because of her impending return to the office of her opponent in this case. I RP 17-19.

Ms. Ellavsky stated that the prosecutor was not going to be one of her supervisors and that she would represent Ms. Kraabell to the best of her ability. I RP 17-18. The court inquired whether the prosecutor, Mr. Richardson, was involved in the decision to re-hire Ms. Ellavsky, and he replied he was not. I RP 18-19. The court denied her motion. I RP 20. The court then inquired if there were any other issues which prevented the parties from being ready to try the case, and they replied there were not. I RP 20-21.

The trial began as scheduled on November 20, 2006. The jury was sworn in on and the State began its case. The deputy prosecutor's presentation of evidence was disorganized and he was unprepared, by his

own admission, to conduct the trial. I RP 50-82, 90-170, 177-181. The court became increasingly annoyed with the State and, to a certain extent, with defense counsel when issues arose that if felt should have been resolved prior to trial. I RP 139-140, 143-144, 149-150, 154, 156, 162, 167-168, 169. At several points it was mentioned that the trial was occurring during the week of Thanksgiving. I RP 156, 167, 169.

During the direct testimony of Corrections Officer Connie Fauver, who was called to testify on behalf of the State, it became apparent that Ms. Kraabell had made an incriminating statement to Fauver pertaining to her possession of methamphetamine. I RP 160-161. Ms. Ellavsky then equivocally requested a 3.5 hearing to litigate the voluntariness of the statement, while also suggesting that she might stipulate to its admission. I RP 162-163 The court suggested that perhaps the issue was one of inevitable discovery and, after substantial discussion between the parties and the court, called a recess so that the attorneys could research the issue. I RP 165, 177. When the parties returned to the record some forty-three minutes later, the court declared a mistrial. I RP 177-183. The issue was first brought up in chambers, and there is no record of this initial conversation between the parties and the court. I RP 177.

When the parties returned to the record, the court began by stating: “We talked in chambers, or off the record, with both the prosecutor and

the Defense in this case, about some issues that have come up and the Court's impression that neither counsel are prepared to go forward with the trial." I RP 177. A discussion then ensued between the parties and the court in which the court opined that Ms. Ellavsky was unprepared to proceed with the trial and Ms. Ellavsky disagreed with that suggestion. I RP 177-78. Ms. Ellavsky stated: "Your Honor, for the record, my position is simply that I feel really confident going forward with the trial." I RP 177. The court then asked Ms. Ellavsky whether it was true that she hadn't reviewed the evidence or interviewed a key witness, which she conceded was true. I RP 178. She remained committed to her position, however, that these deficiencies were not of significant concern to her. I RP 178. What concerned her, she claimed, was that the jury would be angry at her client because they might be forced to deliberate late into the evening on Wednesday, the night before the Thanksgiving holiday. I RP 178.

The deputy prosecutor indicated that his reason for moving for a mistrial was that he was unprepared for trial and did not believe he would succeed in getting the necessary evidence admitted because his law enforcement witnesses would not be able to identify the packages which allegedly contained methamphetamine. I RP 179-180. He indicated an evidentiary hearing was necessary. I RP 180. He then stated it was clear

that in light of the impending holiday, the jury, if required to deliberate on Wednesday evening, would “hold that against” someone and that would be inappropriate. I RP 180. Ms. Ellavsky then interjected that based on the testimony that had been given to that point, she might also have additional witnesses, which was “another incentive for my client to agree to a mistrial.” I RP 180.

After some additional inquiry from the court, both the prosecutor and Ms. Ellavsky conceded that they were unprepared to conduct this trial because they were under the impression this trial was going to be bumped in favor of the in-custody case that was unexpectedly canceled. I RP 182. Ms. Ellavsky did not offer an explanation about why, when she was informed on the Thursday before trial that Ms. Kraabell’s case would, in fact, be tried, she failed to move for a continuance due to her lack of preparedness and instead chose to allow jeopardy to attach before admitting she was unprepared. I RP 182.

The court then asked Ms. Ellavsky if she was asking for a mistrial and “waiving any objections under jeopardy?” I RP 82. Ms. Ellavsky replied “yes.” I RP 82. The court asked Ms. Kraabell if she had discussed the matter with her attorney and if she agreed to a mistrial. I RP 182-183. At this point there was a discussion between Ms. Kraabell and Ms.

Ellavsky off the record. I RP 183. After this discussion, Ms. Kraabell answered “yes.” I RP 183. The court then declared a mistrial. I RP 183.

A second trial commenced on December 11th, 2006. II RP 4. Ms. Kraabell was again represented by Ms. Ellavsky. II RP 4. The State presented evidence that Lenore Smith, a confidential informant working on behalf of the Street Crimes Unit of the Longview Police Department, made three controlled buys from Sherrie Volenski on November 1st, November 3rd, 6th, 2005 II RP 49-68. At the time, Sherrie Volenski was the roommate and romantic partner of Ms. Kraabell. III RP 227. Ms. Smith was working on behalf of the Street Crimes Unit for the purpose of working off charges of burglary, as a result of which she would have been facing a prison sentence. II RP 44. Her contract required her to do five delivery cases. II RP 44. If she completed the cases her pending charges would be dismissed. II RP 45. Ms. Smith brought up the name of “Daphne” to the Street Crimes Unit, not the other way around. III RP 186. The three controlled buys at issue in this case counted as two cases for Ms. Smith: One against Ms. Kraabell and one against Ms. Volenski, who made a deal with the State in exchange for her testimony against Ms. Kraabell. II RP 78, III RP 234.

The State’s theory of the case was that Ms. Kraabell was the accomplice of Ms. Volenski. IV RP 360. Each controlled buy was

initiated by Ms. Smith calling Ms. Kraabell on the telephone. III RP 192-215. Ms. Smith never conducted any transaction with Ms. Kraabell; Ms. Kraabell was never in the room when a transaction occurred, and was not even home during the third controlled buy. III RP 192-215. None of the State's witnesses, other than Ms. Smith and Ms. Volenski, were capable of giving testimony about Ms. Kraabell's involvement in the three controlled buys. Report of Proceedings. Officers Trevino and Rehaume were not privy to the other end of Ms. Smith's phone calls and could not testify that Ms. Kraabell was on the other line for any phone call. 51, 58, 64, 95, 109. No witness for the State, other than Ms. Smith and Ms. Volenski, were present in the house during the controlled buys. III RP 192-248. Further, the body wire worn by Ms. Smith on the second and third buys failed to function. II RP 112. Detective Trevino conceded that he was relying exclusively on the credibility of Lenore Smith in forming his belief about who was on the other end of the line during these phone calls. II RP 82.

Ms. Smith was required, as a part of her contract with the Street Crimes Unit, not to possess or use controlled substances. III RP 188. However, at the time of the first controlled buy, Trevino found several unmarked pills in Ms. Smith's possession that were methadone. III RP 188. In spite of this violation of her contract, Ms. Smith continued to work for the Street Crimes Unit. III RP 189. Trevino could have required

Ms. Smith to submit to a urinalysis as part of her contract, but chose not to. II RP 81, 87, 89. In fact, Trevino has never requested a urinalysis on an informant. II RP 87. Trevino explained his policy and procedure as follows:

Like I explained before, if I have a person that I don't think is being honest with me or a person I think is showing up high or just a problem to me, it might be one of the things that I would use to violate someone. Because we've signed a contract and if I can't use this person then I need some concrete steps to void the contract. II RP 88.

The first buy in this case occurred on November 1st, 2005. III RP 192. She claimed that she spoke with Ms. Kraabell and asked Ms. Kraabell if she could get a half-T of crystal. III RP 192-93. (Detective Trevino testified that an 8th of an ounce is called a "ball," a 16th of an ounce is called a "T," and a 32nd of an ounce is called a "half T"). II RP 46. She claimed that Ms. Kraabell said she didn't have anything there, but said there was somebody in the house who had some. III RP 193-94. She testified she then asked Ms. Kraabell if she could come over and Ms. Kraabell said yes. III RP 194. When Ms. Smith got to the house, Sherrie Volenski's daughter, Jessica, answered the door. III RP 197. She started to walk upstairs to the room she believed was shared by Ms. Kraabell and Ms. Volenski. III RP 197. However, Ms. Kraabell told her to go

downstairs to Sherrie's room. III RP 197. When she arrived at Sherrie's room she purchased methamphetamine from Sherrie. III RP 198.

The second buy occurred on November 3rd, 2005. III RP 201. She claimed that she called Ms. Kraabell on the telephone and asked her for a 16th, or a teener, of crystal. III RP 202. She claims she was quoted a price by Ms. Kraabell and then went to her residence. III RP 203-04. When she arrived, she spoke on an intercom to Ms. Kraabell. III RP 206. She recalled that Ms. Kraabell said something funny about food. III RP 206. Sherrie Volenski then answered the door. III RP 205-06. She then purchased methamphetamine from Sherrie. III RP 207.

The third buy occurred on November 6th, 2005. She testified she called Ms. Kraabell on the phone. III RP 210. She claimed she asked Ms. Kraabell if she could get anything, and believed the amount she requested was a half-T. III RP 210. Ms. Kraabell replied that she was at work and told Ms. Smith to call Sherrie. III RP 210. She then called Sherrie and asked if she could buy a half-T, and replied "yes" and told her to come over. III RP 211-12. Ms. Kraabell then went to Sherrie's house and was let in by Sherrie's daughter, Jessica. III RP 212. When she walked into the room Sherrie was weighing half-T's of methamphetamine. III RP 213. She then purchased methamphetamine from Sherrie. III RP 213-14.

Ms. Volenski testified on behalf of the State. III RP 227. She was charged in the three controlled buys from November 1st, 3rd, and 6th. III RP 232. She was facing prison time for her crimes. III RP 233. She agreed to testify for the State against Ms. Kraabell in exchange for ninety days of local jail time. III RP 234. In her words, the agreement was: “That I testify against Daphne Kraabell and I would get 90 days of county time.” III RP 234. Ms. Volenski was asked by the deputy prosecutor with whom she “conspired” in this case, and she replied “Daphne Kraabell.” III RP 234. Ms. Ellavsky did not object to this question or answer. III RP 234. Ms. Ellavsky did not request the jury instruction under WPIC 6.05, which would have instructed the jury that:

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

There was no dispute that the items Ms. Smith purchased from Ms. Volenski were methamphetamine. Report of Proceedings. The State’s theory that Ms. Kraabell was an accomplice to Ms. Volenski as to counts one through three rested entirely on the testimony of Ms. Smith and Ms. Volenski. Report of Proceedings.

The jury convicted Ms. Kraabell of all five counts. CP 68-72. Ms. Ellavsky did not request an exceptional sentence downward, under *State v. Sanchez*, 69 Wn.App. 255, 848 P.2d 208 (1993) and RCW 9.94A.535 (1) (g). Ms. Kraabell was given a standard range sentence. CP 81. This timely appeal followed. CP 89.

D. ARGUMENT

I. MS. KRAABELL'S CONVICTIONS VIOLATE DOUBLE JEOPARDY BECAUSE THE COURT LACKED GOOD CAUSE TO DECLARE A MISTRIAL.

The double jeopardy clause of the United States Constitution bars retrial on the same or a lesser charge after the discharge of the jury without the accused's consent unless the discharge was necessary in the interests of justice. *State v. Kirk*, 64 Wn.App. 788, 793-94, 828 P.2d 1189 (1992). In *United States v. Dinitz*, the United States Supreme Court addressed the question of when retrial would be barred after the declaration of a mistrial. *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075 (1976). The *Dinitz* Court held that the initial question to be determined is whether the mistrial was declared at the defendant's request or with his consent, or whether the mistrial was declared without his consent. *Dinitz* at 607. Whether with his consent or without, a mistrial implicates a defendant's "'valued right to have his trial completed by a particular tribunal.'" *Dinitz* at 606, citing *Wade v. Hunter*, 336 U.S. 684, 689, 69 S.Ct. 834 (1949), *United States v.*

Jorn, 400 U.S. 470, 484-85, 91 S.Ct. 547 (1971); *Downum v. United States*, 372 U.S. 734, 736, 83 S.Ct. 1033 (1963); *State v. Juarez*, 115 Wn.App. 881, 887, 64 P.3d 83 (2003).

When a mistrial is declared without the defendant's consent, there must be a "manifest necessity" for the mistrial. *Dinitz* at 607. When a mistrial is declared with the defendant's consent, or at his request, it is "ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *Dinitz* at 606. Division I clarified the federal test for retrial after a defendant consents to, or requests, a mistrial: "Only where the governmental conduct in question is intended to 'goad' the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion." *State v. Lewis*, 78 Wn.App. 739, 742, 898 P.2d 874 (1995), citing *Oregon v. Kennedy*, 456 U.S. 667, 676, 102 S.Ct. 2083 (1982).

In contrast several states, such as Oregon, do not require the defendant to prove the government committed misconduct with the intent to goad him into moving for a mistrial. Rather, under the lesser standard applied in Oregon, a defendant must only establish that the improper official conduct is so prejudicial to the defendant that it cannot be cured by means short of a mistrial, and the official knows that the conduct is

improper and prejudicial and either intends or is indifferent to the resulting mistrial or reversal. *Lewis* at 742-43. Washington has not adopted this lesser standard and follows the more burdensome federal standard. *Lewis* at 743.

In *Juarez*, Division III emphasized that a defendant's consent to a mistrial must be freely given. *Juarez* at 888. Consent is freely given when a defendant has not been put in the position of requesting or accepting a mistrial due to bad faith actions by the court or the prosecutor which puts the defendant in the position of either accepting a mistrial or risking serious prejudice to his chances of acquittal. *Lewis* at 888, citing *State v. Rich*, 63 Wn.App. 743, 747, 821 P.2d 1269 (1992).

Here, jeopardy had attached in Ms. Kraabell's first trial, and the State would not credibly suggest otherwise. The record suggests that Ms. Kraabell did not request the mistrial. Although the majority of the discussion about this bizarre conclusion that a mistrial should be declared occurred, as is epidemic in Cowlitz County, off the record, when the parties returned to the record Ms. Ellavsky made reference to her *agreement* to the mistrial, but there was never a formal request or motion by Ms. Ellavsky for the mistrial.

The record demonstrates that Ms. Ellavsky was substantially pressured by the court to agree to this mistrial. The court suggested to Ms.

Ellavsky several times that she was unprepared to proceed with the trial and she initially disagreed strongly with that suggestion. She maintained, several times, that she was in fact prepared to proceed and was comfortable with proceeding. The prosecutor, however, was admittedly unprepared, which makes Ms. Ellavsky's "agreement" to this mistrial that much more confounding and inexcusable. Why would a competent attorney agree to a mistrial so that a befuddled prosecutor can regroup and figure out a way to get his evidence admitted? It hardly needs to be stated that when a prosecutor can't get his evidence admitted, for whatever reason, a competent defense attorney would not then assist him in his quest.

The explanation offered by Ms. Ellavsky as to why, even though she initially claimed she was fully prepared to proceed with the trial, she agreed to this mistrial was because the trial occurred on the week of Thanksgiving and if the jury was forced to deliberate late into Wednesday night (because, apparently, the court was unwilling to entertain any alternative to a late-night Wednesday deliberation, such as bringing the jury back on the following Monday), the jury would unequivocally hold it against one of the parties. The prosecutor joined Ms. Ellavsky in this nonsense. There is, however, no evidence or reason to believe that this jury, which took an oath to fairly try this case, would angrily disregard

their oath and return a verdict that was contrary to the evidence as a means to punish one side for forcing it to sit on a jury in the days before Thanksgiving. It is not as though the jury was going to be required to work on this case *on* Thanksgiving. (In fact, it is much more reasonable to recognize that a jury would be infuriated not by being asked to do the job to which they had already devoted two days, but by having their two days utterly wasted by the mistrial declaration). And any juror who had travel plans for the week would certainly have advised the parties of such fact during voir dire.

Nevertheless, the court seemed persistent in its quest to have Ms. Ellavsky admit that she was unprepared to proceed with the trial, which she finally did. Against this backdrop, with her attorney claiming in her presence that her jury was going to angrily hold their jury service against her in the form of returning verdicts against her irrespective of whether the evidence supported it, and with her attorney claiming she was unprepared to try the case, Ms. Kraabell should not be deemed to have *freely* consented to the mistrial.

Moreover, the court hardly conducted a worthwhile colloquy with Ms. Kraabell about this mistrial. She was not informed about the real consequences of agreeing to a mistrial, or about the true nature of her “waiver” of double jeopardy. Because Ms. Kraabell did not freely consent

to this mistrial, there must have been a manifest necessity for the mistrial. *Juarez* at 889. Here, there was no necessity for this mistrial, much less a manifest necessity. What is obvious from the record is that the attorneys wanted to get on with their holiday, did not want to be stuck in trial, and crafted the reason they felt fit the mistrial request, namely that jurors asked to serve on a jury close in time to a holiday get angry and punish parties by returning verdicts that are contrary to the evidence. There is no evidence to support this thoroughly silly reasoning.

Ms. Kraabell did not feely consent to this mistrial. Her consent was the product of incompetent, if not fraudulent, advice from her attorney, as well as unusual pressure from the court to have both attorneys state they were not prepared for trial. This was likely the product of the court's obvious irritation with the attorneys, and in particular, the prosecutor. This court should reverse Ms. Kraabell's convictions and dismiss this case with prejudice.

II. MS. KRAABELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO REQUEST AN INSTRUCTION UNDER WPIC 6.05 THAT WOULD HAVE CAUTIONED THE JURY ABOUT ACCOMPLICE TESTIMONY

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*,

127 Wn.2d 460, 471, 901 P.2d 186 (1995). Sentencing is a critical stage of a criminal case. *State v. Bandura*, 85 Wn.App. 87, 97, 931 P.2d 174, *review denied*, 132 Wn.2d 1004 (1997). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

WPIC 6.05 instructs juries as follows:

The testimony of an accomplice, given on behalf of the plaintiff, should be subjected to careful examination in the light of other evidence in the case, and should be acted upon with great caution. You should not find the defendant guilty upon such testimony alone, unless, after carefully considering the testimony, you are satisfied beyond a reasonable doubt of its truth.

The note on use in the Washington Pattern Jury Instructions—Criminal state that this instruction should be used in which the State relies upon the testimony of an accomplice. Washington Pattern Jury Instructions—Criminal at page 136. And when the State relies *solely* on the uncorroborated testimony of an accomplice use of this instruction is mandatory. *State v. Sherwood*, 71 Wn.App. 481, 485, 860 P.2d 407 (1993); *State v. Harris*, 102 Wn.2d 148, 155, 685 P.2d 584 (1984),

overruled on other grounds by *State v. McKinsey*, 116 Wn.2d 911, 810 P.2d 907 (1991).

The evidence proving that Ms. Kraabell was an accomplice to the drug transactions between Ms. Smith and Ms. Volenski rested entirely on the testimony of Ms. Volenski and Ms. Smith. Because Ms. Kraabell was never present during these transactions, her involvement and complicity with Ms. Volenski's actions was established through the testimony of Ms. Volenski and Ms. Smith. Ms. Smith merely testified that she had spoken with Ms. Kraabell and claimed Ms. Kraabell had, on at least two of the occasions, assisted her in setting up her drug deal with Ms. Volenski.

Ms. Volenski was the principal actor, according to the State's evidence. She was a co-defendant to Ms. Kraabell in this criminal case until she pleaded guilty in exchange for her testimony. Although Ms. Smith was not charged as an accomplice and was in fact working as a state agent, she, like Ms. Volenski, made a deal with the State in which she gained the benefit of dismissed felony charges and was able to avoid prison by testifying against Ms. Kraabell.

Insofar as both Ms. Volenski and Ms. Smith were admitted drug users who both made deals with the State to avoid prison by testifying against Ms. Kraabell, and insofar as no witness, other than Ms. Volenski and Ms. Smith, could implicate Ms. Kraabell in the three deliveries which

occurred on November 1st, 3rd, and 6th, Ms. Ellavsky's failure to request the "Testimony of Accomplice" instruction constituted deficient representation.

In this case, Ms. Volenski gained a ninety day jail sentence in lieu of prison by pointing her finger at Ms. Kraabell, and Ms. Smith was able to count the prosecution of Ms. Kraabell as one of the five cases she was required to complete as part of her get-out-of-jail free contract with the Street Crimes Unit. A more logical approach would have had Ms. Smith getting credit for one case rather than two for the one act of purchasing methamphetamine from Ms. Volenski, but the State chose to give her credit for a second case for her testimony against Ms. Kraabell.

Simply put, both of these women had a strong incentive to lie. Furthermore, the evidence suggested that Ms. Smith was still using controlled substances in violation of her contract with the Street Crimes Unit at the time of the first buy on November 1st (there would have been no reason for her to be in possession of methadone unless she was planning to consume it). That Trevino only chooses to care about whether his confidential informants use drugs when he wants to void a contract, and fails to understand that it bears directly on their credibility, does not excuse Ms. Ellavsky's failure to request this instruction.

The *Harris* Court gave the following guide for use of this instruction:

We hold: (1) [I]t is always the better practice for a trial court to give the cautionary instruction whenever accomplice testimony is introduced; (2) failure to give this instruction is always reversible error when the prosecution relies *solely* on accomplice testimony; and (3) whether failure to give this instruction constitutes reversible error when the accomplice testimony is corroborated by independent evidence depends upon the extent of corroboration. If the accomplice testimony was substantially corroborated by testimonial, documentary or circumstantial evidence, the trial court did not commit reversible error by failing to give the instruction.

Harris at 155. Applying this guideline, it is clear that Ms. Ellavsky should have proposed this instruction. Although use of this instruction was not mandatory, the *Harris* Court and the language of the instruction itself contemplate its use in discretionary situations such as this, where accomplice testimony should be acted upon carefully. Had the jury been appropriately instructed to regard Ms. Volenski's testimony with caution in light of the windfall she stood to gain by implicating Ms. Kraabell, the result would likely have been different because the State's case, with regard to the three delivery charges, relied almost entirely on Ms. Volenski's testimony. Ms. Kraabell was denied effective assistance of counsel at trial and should be granted a new trial.

III. MS. KRAABELL WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HER ATTORNEY FAILED TO REQUEST AN EXCEPTIONAL SENTENCE DOWNWARD.

The guarantee of effective assistance of counsel extends to sentencing, which is a critical stage of a criminal case. *State v. Bandura*, 85 Wn.App. 87, 97, 931 P.2d 174, *review denied*, 132 Wn.2d 1004 (1997). RCW 9.94A.535 (1) (g) provides that the court may impose an exceptional sentence downward when the operation of the multiple offense policy results in a sentence that is clearly excessive in light of the multiple offense policy. In *State v. Sanchez*, 69 Wn.App. 255, 848 P.2d 208 (1993), Division II held that when multiple controlled buys of controlled substances occur within a short period of time, as directed by the police and police informants, involving relatively small quantities of drugs, an exceptional sentence downward may be warranted because the police have control over how many drug transactions occur and can arrange multiple buys in a short period of time solely for the purpose of increasing an offender score.

In *Sanchez*, the police initiated, through an informant, three controlled buys of cocaine from Mr. Sanchez. The buys occurred over an eight-day period, each involving relatively small amounts of cocaine (one-sixteenth of an ounce, one-eighth of an ounce, and one eighth of an ounce, respectively), and each occurring in the same location (Mr. Sanchez's home). *Sanchez* at 256-57. The trial court ruled that the State had

essentially accomplished its goal after the first buy, and thus the difference between the first buy and the second and third buys was trivial or trifling. *Sanchez* at 261.

The first step of the inquiry is whether the defendant's sentence is attributable to the multiple offense policy. Here, Ms. Kraabell had one prior felony conviction, and gained an additional four points on her offender score by operation of the multiple offense policy. CP 74. Two of those points were attributable to the multiple deliveries initiated by Trevino and Lenore Smith. They were conducted within a six day span, each buy conducted by Lenore Smith and Sherrie Volenski and each occurring at the Volenski/Kraabell residence.

In light of these facts, there is no conceivable reason why Ms. Ellavsky should not have requested a downward departure of Ms. Kraabell's sentence. This was not a guilty plea, wherein the parties were presenting an agreed sentencing recommendation pursuant to a plea bargain. This was a post-trial sentencing, where there is *never* a justification for a defense attorney to simply accept the State's recommendation and fail to advocate for her client. Further, Ms. Kraabell's sentence would likely have been different had Ms. Ellavsky offered any real advocacy to Ms. Kraabell at her sentencing. She received forty-eight months out of a possible sixty months (in addition to nine to

twelve months of community custody) where the principal actor, Sherrie Volenski, entered a deal to receive ninety days. Further these buys occurred over a six-day period and there was no substantive difference between the first buy and the second and third buys. Ms. Kraabell did not receive effective assistance of counsel at sentencing and her sentence should be vacated and her case remanded for a new sentencing hearing.

E. CONCLUSION

This Court should reverse Ms. Kraabell's convictions and dismiss this case with prejudice. Alternatively, this Court should grant Ms. Kraabell a new trial so that she can receive effective assistance of counsel. Alternatively, Ms. Kraabell's sentence should be vacated and her case remanded for a new sentencing hearing.

RESPECTFULLY SUBMITTED this 4th day of September, 2007.


ANNE M. CRUSER, WSBA #27944

APPENDIX

1. § 9.94A.535. Departures from the guidelines

The court may impose a sentence outside the standard sentence range for an offense if it finds, considering the purpose of this chapter, that there are substantial and compelling reasons justifying an exceptional sentence. Facts supporting aggravated sentences, other than the fact of a prior conviction, shall be determined pursuant to the provisions of RCW 9.94A.537.

Whenever a sentence outside the standard sentence range is imposed, the court shall set forth the reasons for its decision in written findings of fact and conclusions of law. A sentence outside the standard sentence range shall be a determinate sentence.

If the sentencing court finds that an exceptional sentence outside the standard sentence range should be imposed, the sentence is subject to review only as provided for in RCW 9.94A.585(4).

A departure from the standards in RCW 9.94A.589 (1) and (2) governing whether sentences are to be served consecutively or concurrently is an exceptional sentence subject to the limitations in this section, and may be appealed by the offender or the state as set forth in RCW 9.94A.585 (2) through (6).

(1) Mitigating Circumstances -- Court to Consider

The court may impose an exceptional sentence below the standard range if it finds that mitigating circumstances are established by a preponderance of the evidence. The following are illustrative only and are not intended to be exclusive reasons for exceptional sentences.

(a) To a significant degree, the victim was an initiator, willing participant, aggressor, or provoker of the incident.

(b) Before detection, the defendant compensated, or made a good faith effort to compensate, the victim of the criminal conduct for any damage or injury sustained.

(c) The defendant committed the crime under duress, coercion, threat, or compulsion insufficient to constitute a complete defense but which significantly affected his or her conduct.

(d) The defendant, with no apparent predisposition to do so, was induced by others to participate in the crime.

(e) The defendant's capacity to appreciate the wrongfulness of his or her conduct, or to conform his or her conduct to the requirements of the law, was significantly impaired. Voluntary use of drugs or alcohol is excluded.

(f) The offense was principally accomplished by another person and the defendant manifested extreme caution or sincere concern for the safety or well-being of the victim.

(g) The operation of the multiple offense policy of RCW 9.94A.589 results in a presumptive sentence that is clearly excessive in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(h) The defendant or the defendant's children suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(2) Aggravating Circumstances -- Considered and Imposed by the Court

The trial court may impose an aggravated exceptional sentence without a finding of fact by a jury under the following circumstances:

(a) The defendant and the state both stipulate that justice is best served by the imposition of an exceptional sentence outside the standard range, and the court finds the exceptional sentence to be consistent with and in furtherance of the interests of justice and the purposes of the sentencing reform act.

(b) The defendant's prior unscored misdemeanor or prior unscored foreign criminal history results in a presumptive sentence that is clearly too lenient in light of the purpose of this chapter, as expressed in RCW 9.94A.010.

(c) The defendant has committed multiple current offenses and the defendant's high offender score results in some of the current offenses going unpunished.

(d) The failure to consider the defendant's prior criminal history which was omitted from the offender score calculation pursuant to RCW 9.94A.525 results in a presumptive sentence that is clearly too lenient.

(3) Aggravating Circumstances -- Considered by a Jury -Imposed by

the Court

Except for circumstances listed in subsection (2) of this section, the following circumstances are an exclusive list of factors that can support a sentence above the standard range. Such facts should be determined by procedures specified in RCW 9.94A.537.

(a) The defendant's conduct during the commission of the current offense manifested deliberate cruelty to the victim.

(b) The defendant knew or should have known that the victim of the current offense was particularly vulnerable or incapable of resistance.

(c) The current offense was a violent offense, and the defendant knew that the victim of the current offense was pregnant.

(d) The current offense was a major economic offense or series of offenses, so identified by a consideration of any of the following factors:

(i) The current offense involved multiple victims or multiple incidents per victim;

(ii) The current offense involved attempted or actual monetary loss substantially greater than typical for the offense;

(iii) The current offense involved a high degree of sophistication or planning or occurred over a lengthy period of time; or

(iv) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(e) The current offense was a major violation of the Uniform Controlled Substances Act, chapter 69.50 RCW (VUCSA), related to trafficking in controlled substances, which was more onerous than the typical offense of its statutory definition: The presence of ANY of the following may identify a current offense as a major VUCSA:

(i) The current offense involved at least three separate transactions in which controlled substances were sold, transferred, or possessed with intent to do so;

(ii) The current offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use;

(iii) The current offense involved the manufacture of controlled substances for use by other parties;

(iv) The circumstances of the current offense reveal the offender to have occupied a high position in the drug distribution hierarchy;

(v) The current offense involved a high degree of sophistication or planning, occurred over a lengthy period of time, or involved a broad geographic area of disbursement; or

(vi) The offender used his or her position or status to facilitate the commission of the current offense, including positions of trust, confidence or fiduciary responsibility (e.g., pharmacist, physician, or other medical professional).

(f) The current offense included a finding of sexual motivation pursuant to RCW 9.94A.835.

(g) The offense was part of an ongoing pattern of sexual abuse of the same victim under the age of eighteen years manifested by multiple incidents over a prolonged period of time.

(h) The current offense involved domestic violence, as defined in RCW 10.99.020, and one or more of the following was present:

(i) The offense was part of an ongoing pattern of psychological, physical, or sexual abuse of the victim manifested by multiple incidents over a prolonged period of time;

(ii) The offense occurred within sight or sound of the victim's or the offender's minor children under the age of eighteen years; or

(iii) The offender's conduct during the commission of the current offense manifested deliberate cruelty or intimidation of the victim.

(i) The offense resulted in the pregnancy of a child victim of rape.

(j) The defendant knew that the victim of the current offense was a youth who was not residing with a legal custodian and the defendant established or promoted the relationship for the primary purpose of victimization.

(k) The offense was committed with the intent to obstruct or impair human or animal health care or agricultural or forestry research or commercial production.

(l) The current offense is trafficking in the first degree or trafficking in the second degree and any victim was a minor at the time of the offense.

(m) The offense involved a high degree of sophistication or planning.

(n) The defendant used his or her position of trust, confidence, or fiduciary responsibility to facilitate the commission of the current offense.

(o) The defendant committed a current sex offense, has a history of sex offenses, and is not amenable to treatment.

(p) The offense involved an invasion of the victim's privacy.

(q) The defendant demonstrated or displayed an egregious lack of remorse.

(r) The offense involved a destructive and foreseeable impact on persons other than the victim.

(s) The defendant committed the offense to obtain or maintain his or her membership or to advance his or her position in the hierarchy of an organization, association, or identifiable group.

(t) The defendant committed the current offense shortly after being released from incarceration.

(u) The current offense is a burglary and the victim of the burglary was present in the building or residence when the crime was committed.

(v) The offense was committed against a law enforcement officer who was performing his or her official duties at the time of the offense, the offender knew that the victim was a law enforcement officer, and the victim's status as a law enforcement officer is not an element of the offense.

(w) The defendant committed the offense against a victim who was acting as a good samaritan.

(x) The defendant committed the offense against a public official or officer of the court in retaliation of the public official's performance of his or her duty to the criminal justice system.

(y) The victim's injuries substantially exceed the level of bodily

harm necessary to satisfy the elements of the offense. This aggravator is not an exception to RCW 9.94A.530(2).

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

STATE OF WASHINGTON,)	Court of Appeals No. 35752-6-II
)	Cowlitz County No. 05-1-01467-6
Respondent,)	
)	AFFIDAVIT OF MAILING
vs.)	
)	
DAPHNE LYNN KRAABELL,)	
)	
Appellant.)	

ANNE M. CRUSER, being sworn on oath, states that on the 4th day of September 2007 affiant placed a properly stamped envelope into the mails of the United States directed to:

Susan I. Baur
Cowlitz County Prosecuting Attorney
312 S.W. 1st Avenuc
Kelso, WA 98626

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402

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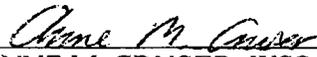
AND

Ms. Daphne Kraabell
DOC# 862382
Washington Corrections Center for Women
9601 Bujacich Rd. N.W.
Gig Harbor, WA 98332-8300

and that said envelope contained the following

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MS. KRAABELL)
- (3) AFFIDAVIT OF MAILING

Dated this 4th day of September 2007


 ANNE M. CRUSER, WSBA #27944
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: September 4th, 2007, Kalama, Washington

Signature: Anne Cruser