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

STATE OF WASHINGTON,
Respondent,

v.

ANDREW KIMBROUGH,
Appellant.

FILED
BY
ms
STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
CLERK OF COURT
JAN 11 2011
TUMWATER, WA

APPELLANT'S BRIEF

Carol A. Elewski, WSBA # 33647
Attorney for Appellant
P.O. Box 4459
Tumwater, WA 98501
(360) 570-8339

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

A. ASSIGNMENTS OF ERROR 1

 Assignments of Error 1

 1. The superior court erred in failing to order the State to disclose the identity of the confidential informant (the CI) for purposes of an *in camera* hearing in this case. 1

 2. The superior court erred in giving the issue of unlawful delivery of a controlled substance to the jury. 1

 3. The superior court erred in giving the issue of unlawful possession with intent to deliver a controlled substance to the jury. 1

 4. The superior court erred in permitting the defendant to be tried in violation of his constitutional rights to the effective assistance of counsel. 1

 Issues Pertaining to Assignment of Error 1

 1. When the determination of whether to order disclosure of a CI requires a balancing test established by the U.S. Supreme Court, our Supreme Court has held that the preferred method for determining that balance is through an *in camera* hearing, and an *in camera* hearing is required when the defendant establishes that the CI may have evidence that would be relevant to the defendant's innocence, did the court err in failing to order an *in camera* hearing in this case when the CI's controlled buy of narcotics from a

third person, not the defendant, formed the basis for the delivery charge? 2

2. Did the State fail to prove the defendant was guilty of unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver when the evidence at trial established the following circumstances:

a. The defendant was associated with the person who apparently made an illegal delivery of a controlled substance to the CI, the defendant had contact with the CI prior to the delivery, and the person making the delivery gave the prerecorded buy money to the defendant; however, the evidence failed to show that the defendant aided or assisted in the delivery; and

b. The evidence established that the defendant possessed 2.6 grams of a substance containing cocaine, an amount that may be consumed by an addict in half a day, and \$445 dollars in cash in large bills. 2-3

3. Alternatively, if the evidence was not insufficient to convict the defendant, was trial counsel ineffective when he failed to introduce at trial the money taken from the defendant at the time of his arrest (four one-hundred dollar bills, two twenties and one five) when such evidence, according to a police officer's testimony, would have been inconsistent with cash carried by a person dealing controlled substances? 3

Standards of Review 4

B. STATEMENT OF THE CASE	4
Introduction	4
Statement of Relevant Facts on Appeal	5
C. ARGUMENT	12
Point I: When Mr. Kimbrough Established that the Identity of the CI Was Relevant and Helpful to his Case, the Trial Court Erred in Failing to Order the State to Disclose the CI's Identity for Purposes of an <i>In Camera</i> Hearing and This Court Should Remand the Case	12
Point II: The State Failed to Prove Mr. Kimbrough's Guilt on Either Charge and this Court Should Reverse His Convictions	15
A. The State Failed To Prove Mr. Kimbrough Aided or Abetted the Unlawful Delivery of a Controlled Substance	16
B. The State Failed To Prove Mr. Kimbrough Unlawfully Possessed a Controlled Substance With The Intent to Distribute	18
Point III: Alternatively, if the Evidence at Trial was Not Insufficient to Convict, Trial Counsel Was Ineffective When He Failed to Introduce the Money Recovered from Mr. Kimbrough at the Time of His Arrest When Such Evidence Was Inconsistent with Guilt on Both Charges	22
D. CONCLUSION	26
CERTIFICATE OF SERVICE	27

TABLE OF AUTHORITIES

Table of Cases

In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) 4

Roviaro v. United States, 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957) 12

State v. Bright, 129 Wn.2d 257, 916 P.2d 922 (1996) . 4

State v. Camarillo, 115 Wn.2d 60, 794 P.2d 850 (1990) 15

State v. Casal, 103 Wn.2d 812, 699 P.2d 1234 (1985) 12

State v. Davis, 79 Wn. App. 591, 904 P.2d 306 (1995) 18, 20, 25

State v. Driscoll, 61 Wn.2d 533, 379 P.2d 206 (1963) 13

State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975) 19

State v. Harris, 91 Wn.2d 145, 588 P.2d 720 (1978) 13

State v. Hutchins, 73 Wn. App. 211, 868 P.2d 196 (1994) 19

State v. Kovac, 50 Wn. App. 117, 747 P.2d 484 (1987) 19

State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989) 19

State v. Massey, 68 Wn.2d 88, 411 P.2d 422 (1966) . 12

State v. Mejia, 111 Wn.2d 892, 766 P.2d 454 (1989) 18

<u>State v. Potter</u> , 25 Wn. App. 624, 611 P.2d 1282 (1980)	12-14
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004)	23
<u>State v. Salinas</u> , 119 Wn.2d 192, 829 P.2d 1068 (1992)	4, 15
<u>State v. Taylor</u> , 74 Wn. App. 111, 872 P.2d 53 (1994)	19
<u>Strickland v. Washington</u> , 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	23

Statutes

RCW 5.60.060(5)	12
RCW 69.50.401(1)(2)(a)	5

Constitutional Provisions

U.S. Const. amend. VI	22
Wash. Const. art. 1 § 22	22

Court Rules

CrR 4.7(f)(2)	12
---------------	----

A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The superior court erred in failing to order the State to disclose the identity of the confidential informant (the CI) for purposes of an *in camera* hearing in this case.

2. The superior court erred in giving the issue of unlawful delivery of a controlled substance to the jury.

3. The superior court erred in giving the issue of unlawful possession with intent to deliver a controlled substance to the jury.

4. The superior court erred in permitting the defendant to be tried in violation of his constitutional rights to the effective assistance of counsel.

Issues Pertaining to Assignment of Error

1. When the determination of whether to order disclosure of a CI requires a balancing test established by the U.S. Supreme Court, our Supreme Court has held that the preferred method for

determining that balance is through an *in camera* hearing, and an *in camera* hearing is required when the defendant establishes that the CI may have evidence that would be relevant to the defendant's innocence, did the court err in failing to order an *in camera* hearing in this case when the CI's controlled buy of narcotics from a third person, not the defendant, formed the basis for the delivery charge? This issue pertains to Assignment of Error No. 1.

2. Did the State fail to prove the defendant was guilty of unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver when the evidence at trial established the following circumstances:

a. The defendant was associated with the person who apparently made an illegal delivery of a controlled substance to the CI, the defendant had contact with the CI prior to the delivery, and the person making the delivery gave the prerecorded buy money to the defendant; however,

the evidence failed to show that the defendant aided or assisted in the delivery; and

b. The evidence established that the defendant possessed 2.6 grams of a substance containing cocaine, an amount that may be consumed by an addict in half a day, and \$445 dollars in cash in large bills.

This issue pertains to Assignments of Error Nos. 2 and 3.

3. Alternatively, if the evidence was not insufficient to convict the defendant, was trial counsel ineffective when he failed to introduce at trial the money taken from the defendant at the time of his arrest (four one-hundred dollar bills, two twenties and one five) when such evidence, according to a police officer's testimony, would have been inconsistent with cash carried by a person dealing controlled substances? This issue pertains to Assignment of Error No. 4.

Standards of Review

Issue 1: Appellate courts review questions of law on a *de novo* basis. See State v. Bright, 129 Wn.2d 257, 265, 916 P.2d 922 (1996) (citation omitted) (question of law subject to *de novo* review).

Issue 2: The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

Issue 3: Appellate courts review a claim of ineffective assistance of counsel *de novo*. In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (citations omitted).

B. STATEMENT OF THE CASE

Introduction

Appellant, Andrew Kimbrough, challenges his convictions for unlawful delivery of a controlled substance and possession with intent to deliver a

controlled substance on the grounds that a) disclosure of the CI would have been relevant and helpful to the defense, b) the State failed to prove the two charged crimes and c) evidence his attorney failed to introduce would likely have resulted in acquittals on both charges.

Statement of Relevant Facts on Appeal

By information filed August 31, 2006, the State charged Mr. Kimbrough with unlawful delivery of a controlled substance and unlawful possession of a controlled substance with intent to deliver, both allegedly committed on August 30, 2006, and both in violation of RCW 69.50.401(1)(2)(a). Clerk's Papers (CP) 1-2.

A video-taped controlled buy from a third person using a CI formed the basis for the charges. On February 22, 2007, Mr. Kimbrough moved the superior court to order disclosure of the identity of the CI on the grounds that the video tape established that Mr. Kimbrough did not exchange the controlled substance for the prerecorded buy money and disclosure would reveal

exculpatory evidence regarding the encounter between Mr. Kimbrough and the CI. CP 24-26. The court did not order such disclosure, and the trial went forward without the CI. See Verbatim Report of Proceedings, volumes 1 and 2 (RP1 and RP2). However, the court did grant Mr. Kimbrough's motion to exclude the audio portion of the video tape from the trial. Thus, the jury viewed only the video portion of that tape. See RP1 at 40.

The State's evidence against Mr. Kimbrough consisted essentially of the video tape, police officers' recounting of the handling of the CI and their observations of the controlled buy, the testimony of officers regarding what they believed such evidence established, and lab reports establishing that the substances recovered from the CI and from Mr. Kimbrough contained cocaine.

Officer Ryan Lane organized the controlled buy in this case. RP1 at 55. The operation was conducted in Tacoma, in an area known to be a high-drug use area. RP1 at 36 & 55-56; RP2 at 22-23. It was recorded on

video tape. RP1 at 35-37. Officer Lane generally described police use of a CI, the concept of a controlled buy, and the use of prerecorded buy money. RP1 at 48-53.

In this case, a CI was directed to make a street-level controlled buy of narcotics. The CI was searched prior to going out on the street and after she returned. RP2 at 7-8 & 10. The officer doing the search did a "general pat-down," searching the waistline and pants or jacket pockets. The pat-down occurred over the CI's clothes, and did not extend to searching the CI's bra. RP2 at 8 & 16-17. No drugs, drug paraphernalia or money was found on her person during the search. RP2 at 8. Prior to the controlled buy operation, the CI was given a prerecorded twenty dollar bill to use in the buy. RP2 at 19. Constant surveillance by at least seven officers was attempted to be maintained on the CI during the controlled buy. RP1 at 40-41 & 56-57; RP2 at 8.

Officer Aaron Quinn, one of the officers conducting surveillance, saw the CI contact Mr.

Kimbrough. The CI stayed with Mr. Kimbrough for a few seconds but then contacted another subject, later determined to be Randall Faison. The contact between the CI and Mr. Kimbrough and the CI and Faison were consistent with a street-level drug buy and consistent with Quinn's experience of middlemen. RP2 at 24-26.

These events were recorded on videotape. The events on the videotape were consistent with what an experienced officer determined to be a street-level narcotics sale. RP1 at 40.

After the operation, the CI gave Officer Lane .2 grams of cocaine, which she had obtained from Faison in exchange for the prerecorded twenty dollar bill. No other drugs or money were found on her person during a final search. RP1 at 12 & 59-62; RP2 at 9-10. Two tenths of a gram of cocaine has a street value of twenty dollars. RP1 at 63.

Three suspects were arrested shortly after the operation. They were encountered off the street, down a ravine in a wooded or swampy area. RP2 at 40. An officer told to arrest "the dealer" arrested Faison.

RP2 at 35. A search of his person revealed neither drugs nor currency. RP2 at 33-34.

Mr. Kimbrough was arrested by Sergeant Shawn Stringer, the officer who supervised the operation. In the search incident to his arrest, Stringer recovered from Kimbrough's right front pants' pocket a plastic bag containing seven rocks, weighing 2.6 grams, of a substance containing cocaine. RP1 at 14; RP2 at 42-43. Four-hundred forty-five dollars was also recovered from Mr. Kimbrough, including the prerecorded twenty-dollar bill the CI was given to purchase narcotics. RP2 at 44-45. Officer Lane's report indicated that the money consisted of four one-hundred dollar bills, one twenty and one five. RP2 at 53.

Stringer testified that it is common for dealers to carry several pieces of crack cocaine. In his experience he had not known a user to break a piece of crack into smaller pieces. RP2 at 43-44. However, he had previously encountered users carrying seven rocks of crack. RP2 at 49.

He also testified that dealers often carry large sums of cash, representing the profits from dealing. He believed it would be very uncommon for a crack user, on the other hand, to carry around \$425. RP2 at 46-47. However, he also noted that drug transactions typically involve only \$20 to \$60, so that it is common for dealers to have a lot of twenty dollar bills. They would need the twenties to make change. RP2 at 49-50. Stringer could not remember with certainty the denominations of the bills recovered from Mr. Kimbrough. However, he agreed that if Lane's report indicated it was four one-hundred-dollar bills, one twenty and one five, that would be correct. RP2 at 53. Finally, he noted that crack users typically carry a device in which to smoke the cocaine. No smoking device was recovered from Mr. Kimbrough. RP2 at 46-47.

Officer Lane testified that 2.6 grams of cocaine was inconsistent with someone solely using drugs. RP1 at 64-65. However, he also testified that an "eight ball" of cocaine, weighing 3.2 or 3.3 grams and consisting of seven or eight rocks, would cost \$100 and

would last a crack addict a day or half a day. RP1 at 72-73. The .2 grams purchased by the CI would only take three or four minutes to consume. RP1 at 73.

Two officers described a typical street-level drug deal: it involves contact and conversation between the buyer and the seller, a hand-to-hand exchange, and frequently involves walking away from the contact location to a more private place. RP1 at 45-48; RP2 at 21. They also described use of a "middler:" when a middler or go-between is used, the middler takes the drugs from the dealer to the customer and returns the purchase money to the dealer. The middler may also direct a customer to the person actually selling the drugs. Middlers are commonly used. RP1 at 45-48; RP2 at 21-22.

After the evidentiary portion of the trial, Mr. Kimbrough moved for a directed verdict on the delivery charge. The court denied the motion. RP2 at 55-56.

The jury convicted Mr. Kimbrough on both counts. RP2 at 105-06.

This appeal followed. CP 21.

C. ARGUMENT

Point I: When Mr. Kimbrough Established that the Identity of the CI Was Relevant and Helpful to his Case, the Trial Court Erred in Failing to Order the State to Disclose the CI's Identity for Purposes of an In Camera Hearing and This Court Should Remand the Case

The superior court should have ordered the State to disclose the CI's identity in this case when the CI likely possessed information relevant and helpful to Mr. Kimbrough. Generally, a confidential informant's identity is privileged and not subject to disclosure. State v. Casal, 103 Wn.2d 812, 815, 699 P.2d 1234 (1985); see RCW 5.60.060(5); CrR 4.7(f)(2). However, when disclosure of a CI's identity is relevant and helpful to the defense, the privilege must give way. Roviaro v. United States, 353 U.S. 53, 61, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957); State v. Potter, 25 Wn. App. 624, 627, 611 P.2d 1282 (1980). On the other hand, disclosure is not required when the evidence the informant possesses would be cumulative or probative of guilt. Potter, 25 Wn. App. at 629. The defendant has the burden of establishing circumstances justifying an exception to the privilege. State v. Massey, 68 Wn.2d

88, 92, 411 P.2d 422 (1966); State v. Driscoll, 61 Wn.2d 533, 536, 379 P.2d 206 (1963).

The determination of whether to order disclosure is a balancing test. Roviaro established that the court must balance "the public interest in protecting the flow of information against the individual's right to prepare his defense." Potter, 25 Wn. App. at 627 (internal quotation marks and citation omitted). The preferred method of determining that balance is through an *in camera* hearing. Id. at 627-28 (quoting State v. Harris, 91 Wn.2d 145, 148, 588 P.2d 720 (1978)).

Whether to hold an *in camera* hearing is a decision based on the relevance of the CI to the defendant's innocence. Once a CI is established to be relevant to a case, the trial court should hold an *in camera* hearing so that it may apply the Roviaro balancing test. Potter, 25 Wn. App. at 627.

In Potter, the court reversed for an *in camera* hearing when the defendant's offer of proof indicated that the confidential informant was "closely connected to the transaction." Id. at 630. Under those circumstances, it held that "an *in camera* hearing

should have been conducted to apply effectively the Roviaro balancing test as stated in State v. Harris." Id.

For the same reasons the court reversed in Potter, this Court should reverse here. Here, similar to Potter, Mr. Kimbrough established that the CI was "closely connected to the transaction." Indeed the CI's interaction with Mr. Kimbrough and Faison formed virtually the entire basis for the charges. Here, the videotape showed the CI contacting Mr. Kimbrough but also showed that the exchange the CI made was with Faison. Indeed, Faison was seen as "the dealer" by the surveilling officers. RP2 at 35.

Under these circumstances, Mr. Kimbrough established the relevancy of the CI's testimony to his case. In his motion for disclosure, he argued that "an *in camera* hearing would allow questioning of the informant regarding conversations between the informant and the defendant regarding the events leading up to the transaction with Faison . . . and the circumstances surrounding this would allow evidence of the defendant's innocence to be explored in regards to the

State's claim of accomplice liability." CP 26. For these reasons, when the factual circumstance made the CI's testimony relevant and helpful to the defense, and under the rules of Harris and Potter, the court erred in failing to order the State to disclose the informant's identity and hold an *in camera* hearing and this Court should reverse and remand.

Point II: The State Failed to Prove Mr. Kimbrough's Guilt on Either Charge and this Court Should Reverse His Convictions

Evidence supports a conviction if, when viewed in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." Id. Credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

A. The State Failed To Prove Mr. Kimbrough Aided or Abetted the Unlawful Delivery of a Controlled Substance

The evidence at trial was insufficient as a matter of law to prove Mr. Kimbrough was guilty as an accomplice of unlawful delivery of a controlled substance. Mr. Kimbrough does not dispute that a controlled substance was delivered to the CI in this case. However, he contends that he was not involved in the delivery. While he ended up in possession of the prerecorded drug money, the CI's purchase was made from Faison. Mr. Kimbrough's position is that Faison gave him the twenty dollars for independent reasons and that he was not involved in the drug deal.

The evidence is clear that Mr. Kimbrough did not deliver the drugs to the CI. To establish accomplice liability, the State was required to prove that Mr. Kimbrough solicited, commanded, encouraged or requested another person to commit the crime or that he aided or agreed to aid another person in the planning or commission of the crime. CP 39. The State failed to meet this burden of proof.

The State's primary evidence against Mr. Kimbrough, the videotape of the CI's controlled buy, established that Faison made an exchange with the CI. However, it failed to establish that Mr. Kimbrough aided the exchange. All it established, at best, was Mr. Kimbrough's presence on the scene of the criminal activity. As the jury instructions cautioned, "more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice." CP 39. Accordingly, the video tape did not establish Mr. Kimbrough's guilt beyond a reasonable doubt.

Moreover, the additional State's evidence also did not prove his guilt on this count. The only other evidence on this point consisted of officers' general testimony regarding street-level narcotics sales and middlemen. This generic evidence was also insufficient, even taken together with the videotape, to establish Mr. Kimbrough's involvement in the drug deal.

For all of these reasons, the State failed to prove Mr. Kimbrough was guilty of the unlawful delivery

of a controlled substance and this Court should reverse this conviction.

B. The State Failed To Prove Mr. Kimbrough Unlawfully Possessed a Controlled Substance With The Intent to Distribute

Similarly, the evidence at trial was insufficient as a matter of law to prove Mr. Kimbrough guilty of unlawful possession of a controlled substance with intent to deliver. The only evidence against Mr. Kimbrough on this count was his possession of drugs (without the recovery of a smoking device) and \$445. This evidence did not establish beyond a reasonable doubt that Mr. Kimbrough had the intent to deliver drugs.

Evidence of intent to deliver "must be sufficiently compelling that the specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability." State v. Davis, 79 Wn. App. 591, 594, 904 P.2d 306 (1995) (citation and internal quotation marks omitted). More than mere possession is required to establish that intent. Id.; cf. State v. Mejia, 111 Wn.2d 892, 766 P.2d 454 (1989) (presence of one and

one-half pounds of cocaine combined with informant's tip sufficient); State v. Hutchins, 73 Wn. App. 211, 868 P.2d 196 (1994) (fourteen ounces of marijuana and police officer's testimony regarding "normal quantity" of marijuana seized insufficient); State v. Taylor, 74 Wn. App. 111, 123, 872 P.2d 53 (1994) (presence of contraband, together with packaging and processing materials sufficient); State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989) (one ounce of cocaine, together with large amounts of cash and scales sufficient); State v. Kovac, 50 Wn. App. 117, 747 P.2d 484 (1987) (possession of seven baggies containing a total of eight grams of marijuana insufficient); State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975) (possession of five one-pound bags of marijuana, scale and the fact that marijuana was usually sold to dealers by the pound sufficient).

In Davis, the court held the evidence insufficient to establish intent to deliver when the defendant possessed six baggies of packaged marijuana, two baggies of seeds, a film canister containing marijuana, a baggie with marijuana residue in it, and a box of

sandwich baggies. In addition, no quantity of money was recovered. The court deemed the nineteen grams of marijuana recovered and the packaging material to be not inconsistent with personal use and reversed the defendant's conviction. Davis, 79 Wn. App. at 595-96.

Similarly, here, the evidence was insufficient to support a finding of intent to deliver. The evidence established that the 2.6 grams recovered from Mr. Kimbrough was not inconsistent with personal use. Officer Lane, the officer organizing the controlled buy and an experienced narcotics officer, testified that an amount of cocaine nearly a gram greater than that recovered from Mr. Kimbrough, an "eight ball" weighing 3.2 or 3.3 grams and consisting of seven or eight rocks, would last a crack addict merely a day or half a day. RP1 at 72-73. Sergeant Stringer, also an experienced officer and the supervisor of the operation, had previously encountered users carrying seven rocks of crack. RP2 at 49. While Lane testified that 2.6 grams of cocaine was inconsistent with someone merely using drugs, RP1 at 64-65, his testimony was contradicted by his own testimony and that of his

supervisor. Under these circumstances, the amount of cocaine recovered from Mr. Kimbrough did not distinguish him from a mere user.

In addition, the \$445 recovered from Mr. Kimbrough also did not establish him to have the intent to deliver drugs to another. While Stringer testified that dealers often carry large sums of cash and users generally do not, RP2 at 46-47, the amount of cash Mr. Kimbrough was carrying cannot be seen as unduly large. Stringer also noted that dealers typically carry their cash in twenty dollar bills. RP2 at 49-50. When Lane's report indicated that the amount of cash recovered from Mr. Kimbrough consisted of four one-hundred-dollar bills, one twenty (plus the prerecorded buy money) and one five, the money recovered from Mr. Kimbrough also did not prove his intent to deliver drugs.

Finally, although Mr. Kimbrough was not found to be carrying a crack pipe, it is well known that addicts use many different devices for smoking crack, including such common items as soda cans. Indeed, Mr. Kimbrough also lacked other items commonly associated with

dealers, such as baggies or a scale. Thus, the absence of drug paraphernalia recovered from Mr. Kimbrough also cannot prove he had the intent to deliver drugs.

For all of these reasons, the State failed to prove the charged crimes as a matter of law and this Court should reverse Mr. Kimbrough's convictions.

Point III: Alternatively, if the Evidence at Trial was Not Insufficient to Convict, Trial Counsel Was Ineffective When He Failed to Introduce the Money Recovered from Mr. Kimbrough at the Time of His Arrest When Such Evidence Was Inconsistent with Guilt on Both Charges

Mr. Kimbrough's State and federal constitutional rights to effective counsel were violated by his attorney's failure to introduce at trial the actual money Mr. Kimbrough possessed. The right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability that the result of the proceeding would have been different.

State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citations omitted).

In determining whether the representation meets the objective standard of reasonableness, a court indulges "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland v. Washington, 466 U.S. 668, 690, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Regarding the prejudice prong, an appellant "need not show that counsel's deficient conduct more likely than not altered the outcome in the case," but need only demonstrate "a probability sufficient to undermine confidence in the outcome." Id. at 693-94. In this case, counsel's performance was both deficient and prejudicial and can in no way be viewed as tactical.

First, counsel's performance was deficient when he failed to introduce into evidence the actual cash recovered from Mr. Kimbrough. Officer Lane's report indicated that the cash was comprised of four one-hundred dollar bills, one twenty and one five. RP2 at 53. This report, however, was not introduced into evidence.

Stringer, on the other hand, the officer who both arrested Mr. Kimbrough and supervised the operation, testified that he believed Mr. Kimbrough was carrying smaller bills, "20s and smaller." RP2 at 53. He also testified that drug dealers typically carry cash in small denominations, such as twenties, because they sell amounts of drugs worth twenty or forty dollars and they also need to make change. RP2 at 49-50.

Thus, the supervisor of the operation made it clear that drug dealers typically do not carry around one-hundred dollar bills. Accordingly, had counsel introduced the actual cash Mr. Kimbrough possessed, he could have established beyond a doubt that such cash was not consistent with money received from drug sales.

Counsel's failure to introduce the cash is inexplicable and, thus, deficient performance. There could be no tactical reason for withholding the cash. Indeed, counsel tried to make his point by referring to Lane's report which detailed the denominations recovered. RP2 at 53. However, his failure to actually introduce the cash kept the issue from being

squarely presented to the jury. Accordingly, counsel's performance was deficient.

Further, counsel's performance was prejudicial when, had the cash been put into evidence, a not guilty verdict on both counts was likely. First, Mr. Kimbrough would likely not have been convicted of the delivery. Evidence of Mr. Kimbrough's involvement in the actual delivery was extremely weak and entirely circumstantial. Thus, had his counsel established that the cash he was carrying was inconsistent with cash carried by a dealer, the jury would likely have acquitted him.

Next, he simply could not have been convicted of possession with intent to deliver once his cash was revealed to be inconsistent with that carried by a dealer. Without the money, the only evidence against him on this charge was the 2.6 grams of cocaine. Mere possession of a personal-use amount of drugs is clearly insufficient to prove intent. See Davis, 79 Wn. App. at 594. Thus, counsel's performance was prejudicial.

For all of these reasons, trial counsel's performance was both deficient and prejudicial, and

this Court should reverse Mr. Kimbrough's convictions on both counts.

D. CONCLUSION

For all of these reasons, Andrew Kimbrough respectfully requests this Court to reverse both of his convictions or remand for an *in camera* hearing with the CI.

Dated this 12th day of October, 2007.

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 12th day of October, 2007,
I served the original and one copy of the attached
brief by U.S. mail, postage prepaid, to:

The Court of Appeals
Of the State of Washington
950 Broadway, Suite 300
Tacoma, WA 98402-4454;

and one copy of the attached brief to:

Ms. Kathleen Proctor
Pierce County Deputy Prosecuting Attorney
930 Tacoma Avenue South
Tacoma, Washington 98402-2102
Respondent's Attorney; and

Mr. Andrew Kimbrough
DOC No. 989047
Olympic Corrections Center
11235 Hoh Mainline, C/W Unit
Forks, WA 98331-9492.

STATE OF WASHINGTON
BY DEPUTY
OCT 13 PM 2:40


Carol Elewski