

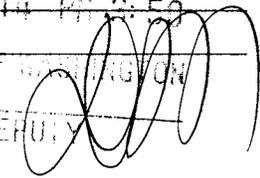
NO. 37009-3

COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY  
DEPUTY



STATE OF WASHINGTON, RESPONDENT

v.

Jorge Luis Avila-Navarro, APPELLANT

Appeal from the Superior Court of Pierce County  
The Honorable Stephanie Arend

No. 06-1-05589-8

**Brief of Respondent**

GERALD A. HORNE  
Prosecuting Attorney

By  
Steve Trinen  
Deputy Prosecuting Attorney  
WSB # 30925

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether it is moot that the statements were admitted in violation of the Sixth Amendment where the defense opened the door to the admission of the statements, and any error from the admission was harmless because the improperly admitted statements were substantially similar to properly admitted statements?

2. Whether the assistance of counsel was effective where defense counsel was pursuing a legitimate trial strategy when the door to the admission of the statements was opened, and where the defendant suffered no harm from the admission of the statements because they were substantially similar to properly admitted statements?

B. STATEMENT OF THE CASE.

1. Procedure

The appellant was charged in Pierce County Superior Court with two counts of Unlawful Delivery of a Controlled Substance. CP 1-2. The case proceeded to trial on November 6, 2007. RP p. 5. The defendant was convicted as to both counts. CP 53, 54. The defendant was sentenced to 12+ months. CP 58-70. This appeal was filed timely. 73-86. Appellant

challenges statements admitted at trial and/or the effective assistance of counsel. Br. App. p.

2. Facts

On October 6, 2006, Pierce County Sheriff's Deputies pursued an undercover controlled substance investigation using a confidential informant. RP 74. Deputy Shaffer was the case officer who ran the controlled buy. RP 77. The officers used the confidential informant, Terry Simmons, to conduct a controlled buy of heroin from 11217 B Street, Unit 2, in East Pierce County. RP 74-76. The target dealer was a female known by the name of Christi. RP 75.

The officers searched the informant before the buy, fitted the informant with a body wire, and provided him with pre-recorded buy money. RP 78, 186-87. Terry Simmons placed a phone call to Christi to set up the buy and told her that he needed three teeners (of heroin). RP 76-77, 187. The officers then dropped Terry Simmons off about a block away from the apartment. RP 81. Terry Simmons approached and entered the residence. RP 81. Inside the residence, Christi told Simmons that she would need to get the money from him first and then she would call her "Mexican friend." RP 188, ln. 13-21. She indicated that her Mexican friend was the person she would buy her heroin from. RP 188, ln. 25. Christi then used Simmon's cell phone to place a call and stated that she needed three teeners. RP 189, ln. 2-12.

It took the source about thirty minutes to arrive. RP 188, ln. 8-9, 189, ln.13-14. At trial, Simmons identified Christi's supplier as the defendant, Avila-Navarro. RP 189, ln. 14-23. Prior to the October 10 transaction, Simmons had seen Avila-Navarro, but never met him. RP 209.

After he arrived, Godfrey and Avila-Navarro went into a room for about 20 seconds, then they came out and Avila-Navarro left. RP 190, ln. 1-10. Christi closed the door behind Avila-Navarro and gave the heroin to Simmons. RP 190, ln. 11. She stated that she got the heroin from "the Mexican." RP 190, on. 12-14.

The officers remained outside in the car watching the residence. RP 81-84. Simmons was inside for just under 45 minutes. RP 83, ln. 13-14. While waiting, the officers observed a Nissan truck arrive. RP 84, ln. 4. They observed a Hispanic male get out of the truck, he was in his mid 30s, approximately 5' 11", and about 170 pounds. RP 84, ln. 13-19. He was inside the residence approximately two minutes. RP 96, ln. 4-5. He then came out of the residence, got in his vehicle and drove away. RP 96, ln. 9. At trial, Deputy Shaffer identified the person who left the truck and entered the house as the defendant, Avila-Navarro. RP 84-85.

Simmons came out of the residence approximately one minute after Avila-Navarro. RP 96, ln. 10-13. He gave the officers three packages of heroin that he had obtained (Ex 5). RP 99, 1-17, 257, ln. 11-15.

The officers conducted a second controlled buy from Godfrey on November 14, 2006, again using Simmons as the informant, however this time the transaction took place at 10405 Croft Street. RP 104-6. Again, Simmons was searched prior to the transaction, fitted with a wire and provided with pre-recorded buy money. RP 106-108, 116, ln. 6-9, 203-05. Simmons contacted Godfrey by telephone to arrange the purchase. RP 202, ln. 9-14. Simmons asked for two or three teeners of heroin, and she agreed to sell them to him. RP 202, ln. 22-25.

Simmons drove a vehicle to the transaction location. RP 108, ln. 3-5. He went into the residence. RP 116, ln. 10-ff. Simmons was inside the residence for 25 to 30 minutes. After he arrived at the house, he had to wait for Godfrey's "guy to show up." RP 205-06. He observed Godfrey place a phone call. RP 206, ln. 8-10. Simmons was at the house ten or fifteen minutes when a vehicle pulled up, and someone arrived at the house, and Godfrey went outside. RP 164-65, 207. Godfrey was outside at the car for less than a minute. RP 165-67, 207, ln. 4. The car pulled off and Godfrey came back in the house and gave Simmons the heroin. RP 16-23. Officers followed the car, observed the driver and later identified him from photos as Avila-Navarro. RP 270-71. Simmons then met up with Deputy Shaffer and provided him with the heroin (Ex 6). RP 118-120, 258, ln. 5-10.

At trial, counsel for the State did not make any inquiries into the service of the search warrant on Christi Godfrey's residence. *See* RP 138, In. 7ff. However, on cross examination, defense counsel asked Deputy Shaffer about evidence he found in the service of the search warrant on Godfrey's residence. RP 126. Deputy Shaffer stated that he found narcotics, drug paraphernalia and money, and that Avila-Navarro was not present when he served the warrant. RP 126, In. 6-7.

On re-direct, the State sought the court's permission to go into the statements of Christi Godfrey regarding the statements she made to Deputy Shaffer after her arrest, arguing that defense counsel had opened the door by initiating the inquiry into what was found when Deputy Shaffer executed the search warrant. RP 136-142. The court ruled that the defense counsel had opened the door, and allowed Deputy Shaffer to testify about the statements Godfrey made to Deputy Shaffer after she was arrested. RP 142-43.

Deputy Shaffer then testified on re-direct that after the search warrant had been served on Godfrey, and after she was under arrest, she had a conversation with him. Deputy Shaffer testified that in that conversation Godfrey stated that she got her heroin from a Mexican male, that he stopped by every couple of days, that sometimes she paid for it, or

got it fronted, and that she middled a few heroin deals and made a few — five to ten dollars after the deals. RP 144-45.

In his trial testimony, Simmons testified that Godfrey told him that she would have to get the money from Simmons, then she had to call her source, her Mexican friend. RP p. 188. Simmons testified that Godfrey used Simmon's phone to call the source, and told the source that she needed three teeners. RP p. 189. It then took a while, about 30 minutes, until Avila-Navarro showed up with the heroin. RP p. 188-89.

C. ARGUMENT.

1. THE DEFENDANT'S RIGHT TO CONFRONT WITNESSES AGAINST HIM WAS NOT VIOLATED IN SUCH A WAY THAT REVERSAL IS WARRANTED WHERE DEFENSE OPENED THE DOOR TO THE STATEMENTS AND ANY ERROR WAS HARMLESS

The State acknowledges that Godfrey's statements to Deputy Shaffer were testimonial hearsay. However, defense counsel opened the door to their admission, and any effort from their admission was harmless.

In *Crawford v. Washington*, the United States Supreme Court held that Sixth Amendment right to confront witnesses meant that out-of-court testimonial statements were not admissible against a criminal defendant unless the declarant was available for cross examination by the defendant (either at trial, or at some prior opportunity). *Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354; 158 L.Ed.2d 177 (2004). No Washington

courts have held that protections granted by Article I § 22 of the Washington Constitution are no greater than those provided under the federal constitution. *State v. Sandoval*, 137 Wn. App. 532, 154 P.3d 271 (2007); *State v. Saunders*, 132 Wn. App. 592, 132 P.3d 743 (2006); *State v. Whelchel*, 115 Wn.2d 708, 801 P.2d 948 (1990). But see, *State v. Mason*, 160 Wn.2d 910, 917 n. 1, 162 P.3d 396 (2007)(stating that they did not reach the issue because it was not adequately briefed, thereby possibly implying that it remains an open question).

The court in *Crawford* “left for another day any effort to spell out a comprehensive definition of ‘testimonial.’” *Crawford*, 541 U.S. at 68. While the definition of “testimonial,” remains subject to refinement, the Court, however, gave guidance on the issue by noting various formulations of the “core class” of testimonial statements at which the Confrontation Clause was directed. The court identified one formulation of “testimonial” as, “affidavits, custodial examinations, prior testimony [...], or similar pretrial statements that declarants would reasonably expect to be used prosecutorially.” *Crawford*, 541 U.S. at 51. A second description given by the court was, “extrajudicial statements contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions. *Crawford*, 541 U.S. at 51-52.

A third description was “statements that were made under circumstances which would lead an objective witness reasonably to believe that the statements would be available for use at later trial.” *Crawford*, 541 U.S. at 51-52.

Nonetheless, the court’s formulation in *Crawford* has left some ambiguity in the definition of “testimonial” that remains subject to further clarification. 541 U.S. at 75-76 (Rehquist, CJ., dissenting); *State v. Mason*, 160 Wn.2d 910, 918-19, 162 P.3d 396 (2007) (citing *Davis v. Washington*, 1547 U.S. 813, 834, 26 S. Ct. 2266, 165 L.Ed.2d 224 (2006)(Thomsas, J., dissenting).

The three different descriptions have lead to two different tests: the “subjective” test, wherein the perceived intent and expectations of the out-of-court declarant determine whether a statement is testimonial; and the “objective” test, wherein whether a statement is testimonial if a reasonable witness would expect the statement to be used as evidence. *See*, Tegland, Evidence Law and Practice, Washington Practice, vol. 5C § 1300.10, (including 2008 pocket part supplement), c. 2007, 2008. Washington initially followed a subjective test in *State v. Shafer*. *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006).

Notwithstanding earlier opinions to the contrary, the court in *Mason* appeared to indicate in dicta that an objective test is now the standard as identified in *Davis*. *Mason*, 160 Wn.2d at 919-20. (The court’s statement in *Mason* is dicta on this matter because the court never

reached the issue of whether the statements were testimonial where it held that the appellant had waived the right to cross examine the defendant because he had subsequently killed the defendant.) *Mason*, 160 Wn.2d at 922.

“[E]ven if the Sixth Amendment is not solely concerned with testimonial hearsay, that is its primary object...” *Crawford*, 541 U.S. at 53. The court noted that while there have always been exceptions to the general rule of exclusion of hearsay evidence, “there is scant evidence that the exceptions were invoked to admit *testimonial* statements against the accused in criminal cases.” *Crawford*, 541 U.S. at 55-56 [emphasis added]. The court also noted that most hearsay exceptions covered statements that by their nature were not testimonial, and specifically refers to the business records exception, and the exception for statements in furtherance of a conspiracy. *Crawford*, 541 U.S. at 56.

Perhaps most important here, the court in *Crawford* also held that the Confrontation Clause does not bar the use of testimonial statements for purposes other than proving the truth of the matter asserted. *Crawford*, 541 U.S. at 59 (citing *Tennessee v. Street*, 471 U.S. 409, 414, 85 L.Ed.2d 425, 105 S. Ct. 2078 (1985)).

The State concedes that the statements were testimonial hearsay and that the defendant was deprived the opportunity to cross examine the declarant, Christi Godfrey. The statements in this case were testimonial because they were made to an officer investigating a crime and a

reasonable declarant should have reasonably expected them to be used in a criminal prosecution.

Nonetheless, the court properly admitted the statements because they were admitted the statements to provide the jury with a more complete context for understanding items that were sought and found when officers served a search warrant on Godfrey's address. The court admitted the statements because the defense counsel inquired about what was found when that warrant was served.

Thus, here the statements were not admitted to prove the truth of the matter asserted. Rather they were admitted to provide context for what the officers found at Godfrey's residence.

Moreover, any error was harmless where the court properly admitted substantially similar statements that Godfrey made to Simmons.

a. Defense Counsel At Trial Waived The Defendant's Confrontation Rights By Opening The Door

The admission or exclusion of relevant evidence is within the discretion of the trial court. *State v. Pirtle*, 127 Wn.2d 628, 648, 904 P.2d 245 (1995), *cert. denied*, 518 U.S. 1026, 135 L.Ed.2d 1084 (1996); *State v. Swan*, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651, *review denied*, 120 Wn.2d 1022 (1992). The trial court's decision will not be reversed on appeal absent an abuse of discretion. *Rehak*, 67 Wn. App. at 162. A trial court abuses its discretion

when its decision is manifestly unreasonable or based on untenable grounds. *State v. Perrett*, 86 Wn. App. 312, 319, 936 P.2d 426, *review denied*, 133 Wn.2d 1019 (1997). The appellant bears the burden of proving abuse of discretion. *State v. Hentz*, 32 Wn. App. 186, 190, 647 P.2d 39 (1982), *rev'd on other grounds*, 99 Wn.2d 538, 663 P.2d 476 (1983).

Where a party is the first to introduce evidence on a subject matter, thereby injecting the issue into the trial, the court may deem the party to have waived any objection to otherwise inadmissible evidence and to allow the opposing party to clarify or explain the evidence. *State v. King*, 58 Wn.2d 77, 360 P.2d 757 (1961)(where in prosecution for a sex offense, the defense on cross examination of a prosecution witness for the first time asked what the witness had told a doctor; prosecution was permitted to ask the doctor what the witness told him.)

Here, where counsel for the defendant was the first to discuss the evidence found when the warrant was served on Christi Godfrey, the court was properly within its discretion to allow the State to pursue the complete context for that evidence by admitting Godfrey's statements to Deputy Shaffer.

b. If There Was Any Error It Was Harmless

The appellant has challenged the statement of Christi Godfrey to Deputy Shaffer as testimonial evidence admitted in violation of his right to

confront Christi Godfrey. However, Christi Godfrey made substantially similar statements to the informant, Terry Simmons, and Simmons properly testified to the jury about those statements.

Two different standards for harmless error have been applied to Washington cases. In *State v. Whelchel*, the Washington Supreme Court held that 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 without the error. *State v. Whelchel*, 115 Wn.2d 708, 728, 801 P.2d 948 (1990) (holding the error was harmless where statements were admitted in violation of the defendant's rights under the confrontation clause). The court in *Whelchel* held that independent of the improperly admitted statements, there was overwhelming evidence to support the defendant's conviction so that the erroneous admission was harmless beyond a reasonable doubt. *Whelchel*, 115 Wn.2d at 730.

However, when the same case went before the Ninth Circuit Court of Appeals on an appeal to a *habeas corpus* motion, the Ninth Circuit held that the standard for harmless error was whether a given error had a substantial and injurious effect or influence in determining the jury's verdict. *Whelchel v. Washington*, 232 F.3d 1197, 1205-06 (9<sup>th</sup> Cir. 2000). In *Whelchel*, the Ninth Circuit affirmed the Federal District Court's grant of *habeas corpus* relief to the defendant, holding that the statements were

not cumulative of other evidence, and were inherently suspect. *Whelchel*, 232 F.3d at 1208. The court also noted that the other evidence did not point overwhelmingly to Whelchel's guilt. *Whelchel*, 232 F.3d at 1208. The court did find harmless error as to other improperly admitted statements where they were merely cumulative. *Whelchel*, 232 F.3d at 1211.

In *State v. Chambers*, the court held that a statement by an agent of the defendant that was made to an undercover officer posing as a drug dealer, was an admissible statement against the defendant because it was not testimonial where the defendant's agent had no reason to believe the statement would be used as evidence in a criminal prosecution. *State v. Chambers*, 134 Wn. App. 853, 860-62, 142 P.3d 668 (2006). The statement was also not excludable hearsay for two reasons. First, it was not hearsay because it was not offered to prove the truth of the matter asserted. (The State admitted the conversation to prove that the defendant's agent and the officer had a conversation about purchasing drugs, not to prove that the agent had the money and how much it was.) *Chambers*, 134 Wn. App. at 859. Second, it was not hearsay where it was an admission (by the defendant's agent) of the party opponent, and therefore subject to the exclusion from hearsay by ER 801(d)(2)(iv). *Chambers*, 134 Wn. App. at 859.

Additionally, the court may affirm on any ground the record adequately supports even if the trial court did not consider that ground. *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).

Here, the statements Godfrey made to Simmons were properly admitted. The statements were not testimonial because they were not made to an officer in anticipation of a criminal trial. Rather they were made to Terry Simmons who was acting as a street level drug purchaser and unbeknownst to Godfrey was acting as an informant for the police. In this regard, *Chambers* is directly on point and controlling.

Here, the statements were also not excludable as hearsay, where they were not hearsay because they were the statements of a co-conspirator during the course and in furtherance of the conspiracy pursuant to ER 801(d)(2)(v). And even if the statements had been hearsay, they would have been admissible as a statement against the declarant's interest pursuant to ER 804(b)(3).

For all these reasons, Godfrey's statements to Simmons were properly admitted at trial. Because those statements were properly admitted, Godfrey's statements to Deputy Shaffer were harmless error. The error was harmless because Godfrey's statements to Deputy Shaffer were substantially similar to the statements Godfrey made to Simmons.

Deputy Shaffer testified that after the search warrant had been served on Godfrey and after she was under arrest, she had a conversation with him. Deputy Shaffer testified that in that conversation, Godfrey stated that she got her heroin from a Mexican male, that he stopped by every couple of days, that sometimes she paid for it, or got it fronted, and that she middled a few heroin deals and made a few — five to ten dollars after the deals. RP 144-45.

Simmons testified that Godfrey told him that she would have to get the money from Simmons, then she had to call her source, her Mexican friend. RP p. 188. Simmons testified that Godfrey used Simmon's phone to call the source, and told the source that she needed three teeners. RP p. 189. It then took a while, about 30 minutes, until Avila-Navarro showed up with the heroin. RP p. 188-89.

Regardless of which standard of harmless error review the court applies, the error here was harmless. Godfrey's statements to Deputy Shaffer were substantially similar to Simmon's testimony. Thus, the statements were cumulative. Accordingly, the court should hold that the erroneously admitted statements were harmless.

Moreover, the court admitted into evidence a copy of the audio recording of the October 10, transaction as Exhibit 15.

2. THE DEFENDANT DID NOT SUFFER INEFFECTIVE ASSISTANCE OF COUNSEL

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *McFarland*, 127 Wn.2d at 334.

Here, the appellant cannot show ineffective assistance for two reasons. First, counsel's representation was not deficient. Defense counsel made a tactical decision to address the evidence obtained from the search of Christi Godfrey's premises in order to show that Godfrey could have been the source of the drugs supplied to the informant, or at least to raise a reasonable doubt that the appellant did so. RP p. 137. While

defense counsel argued that she did not open the door to the admission of Godfrey's statements, it still would have been reasonable for her to do so, where substantially similar statements by Godfrey were going to come in through the informant anyway.

Second, the appellant can show no prejudice precisely because Godfrey's statements to Deputy Shaffer were cumulative where they were substantially similar to Godfrey's properly admissible statements to the informant. Because the statements were substantially similar, the appellant suffered no prejudice.

D. CONCLUSION

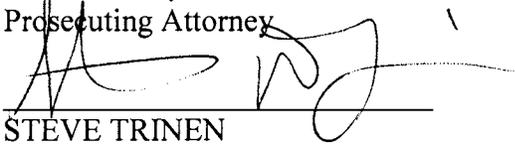
The appellant's argument is without merit where the defense opened the door to the admission of Godfrey's statements to Deputy Shaffer as part of a reasonable trial tactic. The admission of the statements was harmless error where they were substantially similar to properly admissible statements that Godfrey made to the informant Simmons. Nor did the admission of Godfrey's statements to Deputy

Shaffer constitute ineffective assistance of counsel where the opening of the door was consistent with a reasonable trial strategy, and the appellant suffered no prejudice therefrom.

For all these reasons, the court should deny the appeal.

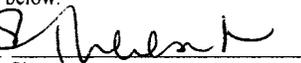
DATED: November 14, 2008.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

  
STEVE TRINEN  
Deputy Prosecuting Attorney  
WSB # 30925

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

11-14-08   
Date Signature

03 NOV 16 PM 3:50  
STATE OF WASHINGTON  
BY   
DIVISION II  
COURT OF APPEALS  
DIVISION II