

NO. 41609-3-II

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

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STATE OF WASHINGTON,

Respondent,

v.

THOMAS DOUGLAS REYNOLDS  
Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF COWLITZ COUNTY

Before the Honorable Jill Johanson, Judge

SUPPLEMENTAL BRIEF OF APPELLANT

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**A. SUPPLEMENTAL ASSIGNMENTS OF ERROR**

1. The trial court erred when it permitted Mr. Fairman's testimony, failed to conduct a meaningful hearing and render definitive findings concerning whether Mr. Fairman was intoxicated, and precluded further inquiry into Mr. Fairman's use of heroin by defense counsel, where counsel objected to the testimony on the basis that Mr. Fairman admitted to using heroin several hours before testifying.

2. The court violated Mr. Reynolds's right to confrontation under the Sixth Amendment of the United States Constitution and the Washington Constitution, Article 1, § 22, by admitting testimonial, hearsay statements of a police confidential informant or informants.

3. The record is constitutionally inadequate to sustain the conviction.

4. There was insufficient evidence to support the conviction.

**B. ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR**

1. Did the trial court deny Mr. Reynolds his due process rights where it allowed a witness who admitted to using heroin the day of trial to testify at trial and precluded further inquiry by defense counsel regarding the witness's use of heroin that day? (Supplemental Assignment of Error 1)

2. In order to admit out-of-court statements as “testimonial evidence,” the confrontation clause of the Sixth Amendment and Article 1, § 22 of the Washington Constitution require either the in-person testimony of the declarant or a full opportunity for cross-examination of an unavailable witness. Here, a police officer was permitted to testify to one or more unnamed, non-testifying declarants’ statement or statements naming Mr. Reynolds as a potential “target” from whom to buy drugs; implying that Mr. Reynolds was a drug dealer. Did the admission of this out-of-court statement violate Mr. Reynolds’ right to confrontation? (Supplemental Assignment of Error 2)

3. Where the record on appeal fails to adequately set forth a wire recording of an alleged “drug buy” by a police informant, is the record insufficient to satisfy appellant's rights to appeal, to due process, and to effective assistance of appellate counsel? (Supplemental Assignment of Error 3)

4. Was there sufficient evidence to support a conviction for delivery of heroin? (Supplemental Assignment of Error 4)

## **C. STATEMENT OF THE CASE**

### **1. Procedural history:**

Thomas Reynolds was charged by information filed in Cowlitz County

Superior Court with one count of delivery of a controlled substance (heroin), in violation of RCW 69.50.401(1). Clerk's Papers [CP] 5-6. The information contained a special allegation under RCW 69.50.435(1)(c) that the offense was committed within 1000 feet of a school bus route stop. CP 6.

At trial, defense counsel objected to Mr. Fairman's testimony pursuant to RCW 5.60.050. 1RP at 92. Outside the presence of the jury, Mr. Fairman was questioned by counsel. Mr. Fairman stated that he was a heroin addict and that he had used heroin at 10:00 a.m. that day. 1RP at 96. He stated that he generally uses a tenth of a gram of heroin at a time, that the amount he uses "just keeps you from getting sick," and that "[y]ou really don't get high . . . ." 1RP at 97. He stated that he did not feel that he was under the effects of heroin at the time. 1RP at 98. The trial court found that Mr. Fairman could testify and that if defense counsel inquired about Mr. Fairman's heroin use, the court would find that "he testified that the heroin he used was a maintenance dose, really doesn't affect—doesn't affect his ability to perceive or communicate. So he's probably better than some witnesses we've had." 1RP at 102-103.

Following counsel's inquiry, the jury was returned to the courtroom. 1RP at 103. Mr. Fairman testified that he tried to contact Thomas Reynolds

or Shelly Green by telephone on February 18, 2010, but was unable to do so. 1RP at 133. He was searched by law enforcement and provided with \$40.00 in "buy money," and was dropped off near the apartment building in which Mr. Reynolds lived and Ms. Green let him into the apartment. 1RP at 111. He stated that he talked with Ms. Green about buying \$40.00 of heroin, and that Mr. Reynolds was sleeping in the back bedroom at the time. 1RP at 134. He stated that Ms. Green said that she only had twenty dollar's worth of heroin. 1RP at 134. He testified that Ms. Green went to get Mr. Reynolds and that he came into the kitchen and that he gave the money to Mr. Reynolds and he handed him \$20 worth of heroin. 1RP at 111, 112, 134.

The State played a nine minute "wire recording," first during Mr. Fairman's testimony and again during closing argument. 1RP at 114-120, 123-130, 2RP at 184-92. The transcription of the wire recording contains approximately 126 notations indicating the testimony is "inaudible" and contains no indication of Mr. Reynolds transferring drugs to Mr. Fairman. For instance the transcript states:

FAIRMAN: How much you (inaudible), have an eight ball, or eight ball.

FEMALE: What?

FAIRMAN: How much (inaudible) for half an eight ball (inaudible)?

Two 20 grams (inaudible).

FEMALE: (inaudible).

(SEVERAL SPEAKERS, INAUDIBLE)

FAIRMAN: Yeah, I need a 40.

REYNOLDS: (Inaudible).

FEMALE: (Inaudible).

FAIRMAN: (Inaudible) my money any more.

FEMALE: We have a 20, I (Inaudible)--

FAIRMAN: Okay. That works, that works.

1RP at 118-19; 2RP at 187-88.

The court entered a Judgment and Sentence on December 21, 2010.

CP 58-66. The Opening Brief of Appellant was filed July 3, 2011.

#### **D. ARGUMENT**

##### **1. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT MR. FAIRMAN WAS COMPETENT TO TESTIFY AT TRIAL UNDER RCW 5.60.050**

The trial court's erroneous ruling on the competency of Mr. Fairman resulted in the introduction of testimony that would not have been otherwise admissible and caused reversible prejudice. The trial court ruled that Mr. Fairman was competent to testify at trial. His in-court testimony was plainly

prejudicial to the outcome in Mr. Reynolds' case.

Every person is competent to testify except as otherwise provided by statute or court rule. RCW 5.60.020; ER 601. RCW 5.60.050, however, provides that certain persons are not competent to testify at a criminal trial, including persons who are intoxicated at the time they are to testify. RCW 5.60.050 provides that two classes of persons are incompetent to testify:

(1) Those who are of unsound mind, or **intoxicated at the time of their production for examination**, and

(2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

RCW 5.60.050 (emphasis added.)

If the witness has not been previously adjudicated insane, the burden of proving incompetency is on the opposing party. *State v. Watkins*, 71 Wn. App. 164, 169, 857 P.2d 300 (1993). The determination of a witness' competency is a preliminary fact question within the sound discretion of the trial court. *Watkins*, 71 Wn.App. at 170. The trial court's decision will not be disturbed on appeal absent manifest abuse of discretion. *State v. Froelich*, 96 Wn.2d 301, 304, 635 P.2d 127 (1981).

The plain language of RCW 5.60.050(1) and legal *dicta* suggest, that

any witness who is intoxicated should **never** be permitted to testify the record established ample reason to doubt the witness' competency.

The State proffered Mr. Fairman as an eyewitness to the alleged drug deal. When questioned by counsel at 3:53 p.m., Mr. Fairman denied being under the influence of heroin and stated that although he had used heroin that day, the amount he used was "enough just to keep from gettin' sick." 1RP at 96-98. However, he acknowledged that he had been a heroin addict for four years and that he had intravenously used heroin at 10:00 a.m. that day, and that the effects of heroin are "good for all day." 1RP at 96-98.

The holding of *State v. Dault*, 19 Wn.App. 709, 578 P.2d 43 (1978) is distinguishable from the case at bar. In *Dault*, the defendant attempted to discredit a State witness. He asked on cross-examination: 'Are you using methadone now?' *Id.* at 718. The State objected. The court sustained the objection. The defendant then made an offer of proof-the witness would testify that she was hospitalized for methadone treatment and is currently on methadone. *Id.* at 718-19. The defendant argued that methadone 'has a physiological and psychological effect on a person who is using it. And that it is a substitute for heroin and induces kind of a high or tranquilizing effect.' *Id.* at 719. The court rejected the showing and found that it was inadequate in the

absence of expert testimony. *Id.* at 719-20.

Here, Mr. Fairman's admission of a long-term heroin addiction and admission of using heroin that day was far more compelling than merely asserting that he was "on methadone." Rather than proffering evidence that Mr. Fairman was merely "on drugs" in the sense that he used heroin, counsel elicited specific testimony that he had used heroin at 10:00 a.m. that day, that he was testifying several hours later, and that the effects were "good for all day. 1RP at 97.

The appellant submits that *United States v. Crosby*, 149 U.S. App. D.C. 306, 462 F.2d 1201, 1203 (1972) is instructive. In *Crosby*, the witness was a long time drug addict who had used drugs on the day of trial and who had been hospitalized for drug addiction. The appellate court held that the trial judge's refusal to examine the medical records bearing on the witness's condition was an abuse of discretion and remanded for the court to consider the records to determine whether they "undercut" his competency finding. 462 F.2d at 1203.

Based on Mr. Fairman's admission of drug use, the Court had a duty to conduct further inquiry and make definitive findings other than to essentially downplay the issue by stating that Mr. Fairman could testify and

that if counsel inquired into his drug use, the court would find the that usage was a “maintenance dose” and that Mr. Fairman was “probably better than some witnesses we’ve had.” 1RP at 103. The disturbing fact that the court had apparently previously allowed intoxicated witnesses to testify in other case has no bearing on whether Mr. Fairman should have been permitted to testify in Mr. Reynolds’ case, and in fact the court’s statement indicates a troubling pattern of allowing intoxicated persons to testify in apparent violation of RCW 5.60.050.

The trial court erred when it abdicated its duty to resolve the issue of Mr. Fairman’s intoxication, and permitted him to testify.

In addition, the trial court erred by precluding defense counsel from cross examining Mr. Fairman regarding his drug use. The right to confront and cross-examine adverse witnesses is guaranteed by both the federal and state constitutions. U.S. Const. amend 6; Const. art. I, § 22; *Washington v. Texas*, 388 U.S. 14, 23, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974); *State v. Hudlow*, 99 Wash.2d 1, 15, 659 P.2d 514 (1983). Evidence Rule 608(b) also allows, in the court's discretion, for the cross-examination of a witness as to specific instances of conduct if the inquiry is germane to that witness's

propensity for truthfulness.

The primary and most important component is the right to conduct meaningful cross-examination of adverse witnesses. *State v. Foster*, 135 Wn.2d 441, 455-56, 957 P.2d 712 (1998). The purpose is to test the perception, memory, and credibility of witnesses. *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982); *State v. Roberts*, 25 Wn.App. 830, 834, 611 P.2d 1297 (1980). Confrontation therefore helps assure the accuracy of the fact-finding process. *Chambers v. Mississippi*, 410 U.S. 284, 295, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973). Whenever the right to confront is denied, the ultimate integrity of this fact-finding process is called into question. *Id.*

The right to cross-examine adverse witnesses is not absolute. *Chambers*, 410 U.S. at 295, 93 S.Ct. 1038. Courts may, within their sound discretion, deny cross-examination if the evidence sought is vague, argumentative, or speculative. *State v. Jones*, 67 Wn.2d 506, 512, 408 P.2d 247 (1965). Since cross-examination is at the heart of the confrontation clause, it follows that the confrontation right is also not absolute. The confrontation right and associated cross-examination are limited by general considerations of relevance. *See* ER 401, ER 403; *Hudlow*, 99 Wn.2d at 15, 659 P.2d 514.

A court reviews a trial court's limitation of the scope of cross-

examination for a manifest abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002). “Abuse exists when the trial court's exercise of discretion is ‘manifestly unreasonable or based upon untenable grounds or reasons.’” *Darden*, 145 Wn.2d at 619 (quoting *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995)).

Here, the trial court judge precluded counsel from cross-examining Mr. Fairman on the issue of his intoxication. The court did not make a ruling on the issue of relevancy, or that the testimony sought was vague, argumentative, or speculative, but instead noted that it would find that Mr. Fairman’s use of heroin that day was a “maintenance dose” and therefore did not affect his testimony. The court’s statement, which effectively cut off cross-examination of Mr. Fairman, was not based on a finding of irrelevancy or other recognized basis to restrict confrontation. In addition, the court’s finding that the heroin used by Mr. Fairman was a “maintenance dose” is not based on any expert testimony presented at trial. The appellant submits that the court abused its discretion and that the conviction must be reversed.

2. **THE COURT IMPROPERLY ADMITTED STATEMENTS BY A CONFIDENTIAL INFORMANT IN VIOLATION OF MR. REYNOLDS’ RIGHTS TO CONFRONTATION.**

Detective Streisguth testified that unidentified declarant or declarants, provided him with a list of potential “targets,” and Mr. Fairman also named Mr. Reynolds as a potential “target” for a controlled drug buy. 1RP at 36, 37, 38. The information from the unnamed declarant or declarants led to the choice by police to target Mr. Reynolds as someone from whom Mr. Fairman would attempt to buy drugs—the implication of the unnamed informants’ statement being that Mr. Reynolds is a drug dealer. Mr. Reynolds objected to the hearsay statement of the unidentified declarant or declarants, but the trial court admitted the testimony of Detective Streisguth. 1RP at 38.

The confrontation clause prohibits admission of statements by absent declarants when those statements are “testimonial” in nature. A defendant’s constitutional right to confront witnesses against him requires actual confrontation and the opportunity to cross-examine the State’s witnesses. *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 1359, 158 L.Ed.2d 177 (2004). The Sixth Amendment grants a defendant the right “to be confronted with witnesses against him.” The Washington Constitution similarly guarantees an accused the right “to meet the witnesses against him face to face.” Wash. Const. Art. 1, § 22.<sup>1</sup>

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<sup>1</sup> An analysis under *State v. Gunwall*, 106 Wn .2d 54, 720 P.2d 808 (1986) is not provided due to the decision in *State v. Pugh*, 167 Wn.2d 825, 225 P.3d 892 (2009) in which the

An out-of-court statement that is testimonial in nature is inadmissible at trial, unless the declarant is unavailable to testify and the defendant has had a full opportunity to cross-examine him or her. *Crawford*, 541 U.S. at 68.

“An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.” *Crawford*, 541 U.S. at 51. The Court has since defined what constitutes a testimonial statement:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

*Davis v. Washington*, 547 U.S. 813, 822, 126 S. Ct. 2266, 165 L.Ed.2d 224 (2006). The same principle applies to statements, such as the one at issue here, made without interrogation. “Of course ... it is in the final analysis the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate.” *Id.* at 822, n. 1.

The only relevant questions for confrontation are whether the out of

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Court found that an analysis is longer necessary because of its previous decisions concluding that article I, section 22 of the state constitution is subject to an independent analysis from the Sixth Amendment with regard to both the scope of the confrontation right as well as the manner in which confrontation occurs. *Pugh*, 167 Wn.2d at 839.

court statement was testimonial, whether the declarant was unavailable to testify, and whether Mr. Reynolds' right to cross-examination has been satisfied.

**i. The unnamed informant's statement was testimonial, requiring a right of confrontation.**

The statement by an unnamed police informant or informants in this case clearly falls under this definition. The statement falls within the "pretrial statements that declarants would reasonably expect to be used prosecutorially," that comprise the "core class" of testimonial evidence protected by the confrontation clause. *Crawford*, 541 U.S. at 51. Here the declarant made the statement to the police in a non-emergency situation. There was no reason to make this allegation to the police except to assist in an investigation or controlled buy. There can be no doubt that the statement was testimonial.

**ii. The declarant was available to testify.**

None of the criteria of ER 804 are applicable. Washington's Rules of Evidence provide a declarant is "unavailable" as a witness if he

(1) Is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Testifies to a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subsection (b)(2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

(6) A declarant is not unavailable as a witness if the exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

ER 804(a).

The declarant's identity was known to the State; it simply choose not to procure the declarant's attendance at trial. The State is required to make a good faith effort to obtain the witness at trial before he may be considered unavailable. *State v. Sanchez*, 42 Wn. App. 225, 230, 711 P.2d 1029 (1985).

The trial court made no finding that the witness was unavailable. In the absence of such a finding, this Court must assume he or she was available. The trial court not only erred in failing to determine his or her availability, but also in admitting the statement without affording Ms. Reynolds the

opportunity to cross-examine.

**iii. Admission of the hearsay statement violated Mr. Reynolds' right to cross-examination.**

The admission of the testimonial statement violates Mr. Reynolds' right to confrontation because he did not have the opportunity to cross-examine the declarant or declarants. This Court need not rule that the statement was hearsay in order to find that it was inadmissible. See *State v. Mason*, 160 Wn.2d 910, 921-22, 162 P.3d 396 (2007). The admission of the testimonial statement violated the Confrontation Clause without a full and fair opportunity for cross-examination. The opportunity to cross-examine a witness, to test the witness's perception, memory and credibility, is the fundamental purpose of the constitutional right of confrontation. *Davis v. Alaska*, 415 U.S. 308, 315, 94 S.Ct. 1105, 39 L.Ed.2d 34(1974); *State v. Parris*, 98 Wn.2d 140, 144, 654 P.2d 77 (1982).

Cross-examination plays a central role in ascertaining the truth. *Crawford*, 541 U.S. at 42; *California v. Green*, 399 U.S. 149, 158, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). In the absence of any indication to the contrary, the declarant or delcarants were available, yet Mr. Reynolds was afforded no opportunity for cross-examination. Even if the declarant was found to be

unavailable, Ms. Reynolds was given no other opportunity to cross-examine any declarant, or even interview him, since the police failed to make it possible.

The error is not harmless and reversal is required. A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in absence of the error. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *State v. Maupin*, 128 Wn.2d 918, 928-29, 824, 813 P.2d 808 (1996).

Mr. Reynolds' conviction was based in part on a uncross-examined out-of-court statement, in violation of the Sixth Amendment and Washington Constitution, Art. 1, § 22. The violation of this critical protection of a fair trial requires reversal of the conviction. *Crawford*, 541 U.S. at 69.

**3. THE RECORD IS CONSTITUTIONALLY INADEQUATE TO SUSTAIN THE CONVICTION.**

An appellant has the right to an accurate record of the trial court proceedings. The state constitution guarantees that a person accused and convicted of a crime has the right to appeal. Const. art. 1, § 22; *State v. Kells*, 134 Wn.2d 309, 949 P.2d 818 (1998); *State v. Tomal*, 133 Wn.2d 985, 948 P.2d 833 (1997); *State v. Sweet*, 90 Wn.2d 282, 581 P.2d 579 (1978). The state

and federal due process and equal protection clauses require the state to provide a record of sufficient completeness for an indigent appellant to permit the meaningful exercise of the right to appeal. U.S. Const., amends. 5, 14; Const., art. 1, §§ 3, 12, 22; *State v. Larson*, 62 Wn.2d 64, 381 P.2d 120 (1963); *Draper v. Washington*, 372 U.S. 487, 496-498, 9 L. Ed. 2d 899, 83 S. Ct. 774, 779-780, cert. denied, 374 U.S. 850, 374 U.S. 852 (1963); see also, Const. art. 4, § 11, RCW 2.08.030; RCW 2.32.050(2).

Along with the right to a complete record, an appellant also has the right to the effective assistance of counsel, as counsel on review cannot provide such assistance without an adequate record of the trial proceedings. U.S. Const. amend. 6; Const. art. 1, § 22 ; *Larson*, 62 Wn.2d at 67; see also *Evitts v. Lucey*, 469 U.S. 387, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985).

Here, the transcript from Mr. Reynolds' trial has a substantial deficiency that renders it constitutionally inadequate. The trial transcript of the relatively short wire recording contains not fewer than 126 notations indicating the taped record of the hearing was "inaudible" to the transcriptionist. 1RP at 114-120, 123-130, 2RP at 184-92.

In the absence of an accurate and complete record of the wire recording, it is impossible to ascertain whether the record is sufficient to

support a conviction. In assessing that portion of the recording that was audible and intelligible to the transcriber, it does not support of finding of sufficient evidence to support a conviction. In the portion in which Mr. Fairman refers to an “eight ball”, a female voice is speaking to him. According to the transcript, a voice identified as Mr. Reynolds is inaudible. 2RP at 187. A voice identified in the transcript as Mr. Reynolds subsequently refers to a telephone call, indicating that he was on the telephone when Mr. Fairman was referring to “an eight ball.”<sup>2</sup>

Appellate counsel was not trial counsel. Appellate counsel is unable fulfill his constitutional duty to provide effective assistance on appeal where a critical recording is largely unintelligible. Counsel maintains this belief after an evaluation of the existing inadequate record and his efforts to prepare this supplemental brief.<sup>3</sup>

Where the record is inadequate for appeal, the remedy is to vacate the conviction and remand for a new trial. *Larson*, 62 Wn.2d at 67; *U.S. v. Cordobas*, 981 F.2 1206, 1212 (11th Cir. 1993) (presumption of prejudice attaches where appellate counsel was not trial counsel and there are significant

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<sup>2</sup>The CD of the wire recording was introduced as Exhibit 2A.

<sup>3</sup>Appellate counsel also independently reviewed the CD of the trial and was unable to decipher the inaudible portions of the wire recording, and in fact was unable to ascertain with specificity which of the two males on the transcript were speaking; counsel is unable to

missing portions of the record); but cf., *United States v. Antoine*, 906 F.2d 1379, 1381 -82 (9th Cir. 1990) (Ninth Circuit found vacation of conviction and remand for determination of prejudice to be an appropriate remedy).

The appellant submits that this Court should vacate the conviction and remand for a new trial.

**4. THERE IS INSUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION.**

In reviewing a case to determine whether there was sufficient evidence to support a conviction, this Court determines "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). In this case, Mr. Reynolds was charged with of delivery of heroin. However, due to the lengthy and frequent inaudible portions of the body wire transcript, there is insufficient evidence to support that conviction. See §3 of this brief, *supra*.

Given the condition of the transcript, the case simply becomes Mr. Reynolds' word against that of Mr. Fairman. None of the officers saw Mr. Reynolds give drugs to Mr. Fairman. Even if even taken in the light most favorable to the State, the evidence offered by the State hardly amounts to

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differentiate between the two male voices on the recording.

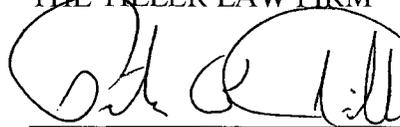
evidence beyond a reasonable doubt that Mr. Reynolds delivered drugs to Mr. Fairman. Therefore, reversal and dismissal of the count is required. *State v. Spruell*, 57 Wn. App. 383, 389, 788 P.2d 21 (1990).

**E. CONCLUSION**

This Court should grant the motion, vacate appellant's conviction, and dismiss this matter, or in the alternative, remand for a new trial.

DATED: August 30, 2011.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read "Peter B. Tiller", written over a horizontal line.

PETER B. TILLER-WSBA 20835  
Of Attorneys for Thomas Reynolds

EXHIBIT A

STATUTES

*RCW 5.60.050*

Who are incompetent.

The following persons shall not be competent to testify:

- (1) Those who are of unsound mind, or intoxicated at the time of their production for examination, and
- (2) Those who appear incapable of receiving just impressions of the facts, respecting which they are examined, or of relating them truly.

Art. 1, § 22 provides in relevant part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel

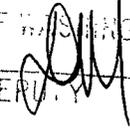
the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases[.]

The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS DOUGLAS  
REYNOLDS,

Appellant.

COURT OF APPEALS NO.  
41609-3-II

COWLITZ COUNTY NO.  
10-1-00904-1

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Supplemental Brief of Appellant was mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Thomas Reynolds, Appellant, and David Phelan, Deputy Prosecutor, by first class mail, postage pre-paid on August 30, 2011, at the Centralia, Washington post office addressed as follows:

Mr. David Phelan  
Deputy Prosecutor  
312 SW 1<sup>st</sup> Ave.  
Kelso, WA 98626

Mr. David Ponzoha  
Clerk of the Court  
Court of Appeals  
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Tacoma, WA 98402-4454

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DATED: August 30, 2011.

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