

NO. 45178-6-II

COURT OF APPEALS, DIVISION II

---

STATE OF WASHINGTON,

Respondent,

vs.

KEVIN V. JOHNSON,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT  
FOR THURSTON COURT  
The Honorable Erik D. Price, Judge  
Cause No. 12-1-01454-3

---

BRIEF OF APPELLANT

---

THOMAS E. DOYLE, WSBA NO. 10634  
Attorney for Appellant

P.O. Box 510  
Hansville, WA 98340  
(360) 626-0148

TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR .....	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
C. STATEMENT OF THE CASE.....	2
D. ARGUMENT .....	5
THE TRIAL COURT ERRED IN ADMITTING (1) EVIDENCE FROM THE SUSPECTS OF AN UNRELATED INVESTIGATION OF THE PHONE NUMBER OF THEIR SOURCE FOR METHAMPHETAMINE, (2) THAT THE RELATIONSHIP BETWEEN VICTORIA STOTTS AND JOHNSON WAS THAT OF BOYFRIEND-GIRLFRIEND, AND (3) THAT STOTTS TOLD DETECTIVE HOLLINGER WHAT HER PHONE NUMBER WAS, WHICH WAS THE SAME NUMBER AS THAT GIVEN BY THE SUSPECTS OF THE UNRELATED INVESTIGATION.....	5
E. CONCLUSION .....	12

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>State of Washington</u>	
<u>State v. Foster</u> , 135 Wn.2d 441, 957 P.2d 712 (1998).....	9
<u>State v. Guloy</u> , 104 Wn.2d 412, 705 P.2d 575 (1989), <u>cert. denied</u> , 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986).....	10, 11
<u>State v. Kelly</u> , 102 Wn.2d 188, 685 P.2d 564 (1984).....	11
<u>State v. Koslowski</u> , 166 Wn.2d 409, 209 P.3d 479 (2009).....	10
<u>State v. Lane</u> , 56 Wn. App. 286, 786 P.2d 277 (1989).....	3
<u>State v. Pugh</u> , 167 Wn.2d 825, 225 P.3d 892 (2009).....	9
<u>State v. Smith</u> , 148 Wn.2d 122, 59 P.3d 74 (2002) .....	11
 <u>Federal Cases</u>	
<u>Crawford v. Washington</u> , 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).....	9, 10
 <u>Constitutional</u>	
Sixth Amendment .....	9
Art. I, sec. 22 of the Washington Constitution .....	9
 <u>Statutes</u>	
RCW 69.50.401 .....	2
RCW 69.50.435 .....	2

Rules

ER 401 ..... 7

ER 801(a)..... 7

ER 801(c)..... 7, 8

ER 805 ..... 8

Other

W. LaFave, Search and Seizure SS 3.3(b) (1978) ..... 3

A. ASSIGNMENTS OF ERROR

01. The trial court erred in admitting evidence from the suspects of an unrelated investigation of the phone number of their source for methamphetamine.
02. The trial court erred in admitting evidence that the relationship between Victoria Stotts and Johnson was that of boyfriend-girlfriend.
03. The trial court erred in admitting evidence that Stotts told Detective Hollinger what her phone number was, which was the same number as that given by the suspects of the unrelated investigation.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in admitting hearsay testimony regarding the phone number for the source of methamphetamine for suspects of an unrelated investigation? [Assignment of Error No. 1].
02. Whether the trial court erred in admitting hearsay testimony regarding the relationship between Victoria Stotts Johnson? [Assignment of Error No. 2].
03. Whether the trial court erred in admitting hearsay testimony regarding the relationship between Victoria Stotts and Johnson that violated the confrontation clause under the Sixth Amendment and article I, section 22 of the Washington Constitution? [Assignment of Error No. 2].

//

//

04. Whether the trial court erred in admitting hearsay testimony that Stotts told Detective Hollinger what her phone number was, which was the same number as that given by the suspects of the unrelated investigation? [Assignment of Error No. 3]
05. Whether the trial court erred in admitting hearsay testimony that Stotts told Detective Hollinger what her phone number was, which was the same number as that given by the suspects of the unrelated investigation, and which violated the confrontation clause under the Sixth Amendment and article I, section 22 of the Washington Constitution? [Assignment of Error No. 3].

C. STATEMENT OF THE CASE

01. Procedural Facts

Kevin V. Johnson was charged by first amended information filed in Thurston County Superior Court March 6, 2013, with unlawful delivery of methamphetamine within 1000 feet of a school bus route stop, contrary to RCWs 69.50.401(2)(b) and 69.50.435(1). [CP 22].

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8]. Trial to a jury commenced June 10, the Honorable Erik D. Price presiding.<sup>1</sup> Neither objections nor exceptions were taken to the jury instructions. [RP 323-24].<sup>2</sup>

Johnson was found guilty as charged, sentenced under the Special

---

<sup>1</sup> Johnson's initial trial ended in a mistrial due to newly discovered evidence. [RP 03/07/13 15].

<sup>2</sup> References to the Report of Proceedings are to the transcripts entitled "Jury Trial."

Drug Offender Sentencing Alternative (DOSA) to 32 months confinement, half of the midpoint of his standard range, and timely notice of this appeal followed. [CP 168-177].

02. Substantive Facts

On April 11, 2013, the Thurston County Narcotics Task Force used Wayne Blocher, a confidential source, to conduct a controlled buy<sup>3</sup> of approximately one-half ounce of methamphetamine from a suspect for \$600 [RP 65-67, 81-83, 88-91, 119, 133-34, 251], which took about three to five minutes, occurred behind some shrubbery outside the view of the Task Force's surveillance unit and was within 1,000 feet of a school bus route stop designated by a school district. [RP 119, 124, 226-232, 255-56]. An attempted transaction earlier that day involving the same individuals had failed due to a misunderstanding regarding quantity and price. [RP 79, 82, 280]. Blocher arranged the "buy-walk transaction"<sup>4</sup> using a cell number obtained from the targets of another investigation. [RP 67-70, 80-81]. On May 5th, he identified Johnson from a Department of Licensing photograph as the suspect from whom he had purchased the

---

<sup>3</sup> In a "controlled buy," an informant is given marked money, searched for drugs, and observed while sent into the specified location. If the informant "goes in empty and comes out full," his or her assertion that drugs were available is proven, and his or her reliability confirmed. *State v. Lane*, 56 Wn. App. 286, 293, 786 P.2d 277 (1989) (citing 1 W. LaFave, *Search and Seizure* SS 3.3(b), at 512 (1978)).

<sup>4</sup> In a buy-walk transaction, after the drugs are purchased the police "let the money and the bad guy walk to identify further information." [RP 71].

methamphetamine. [RP 296-97].

Johnson read into the record the prior March 7<sup>th</sup> sworn testimony of Blocher, wherein he was unable to identify Johnson in open court as the person from whom he had purchased the methamphetamine: “I couldn’t tell you for sure.” [State’s Exhibit 44 at 9].

In rebuttal, the State presented testimony that while Blocher was in custody at the Thurston County Jail from about February 22<sup>nd</sup> to March 7<sup>th</sup> [RP 313], he had a telephone conversation with a woman, telling her he was hopeful ““these guys take a deal.”” [RP 314]. The unnamed female told Blocher to be vague, that Johnson was changing his complete appearance and that Blocher could say he didn't recognize him, to which Blocher responded he was going to do whatever he could. [RP 315].

//

//

//

//

//

//

//

//

//

D. ARGUMENT

THE TRIAL COURT ERRED IN ADMITTING (1) EVIDENCE FROM THE SUSPECTS OF AN UNRELATED INVESTIGATION OF THE PHONE NUMBER OF THEIR SOURCE FOR METHAMPHETAMINE, (2) THAT THE RELATIONSHIP BETWEEN VICTORIA STOTTS AND JOHNSON WAS THAT OF BOYFRIEND-GIRLFRIEND, AND (3) THAT STOTTS TOLD DETECTIVE HOLLINGER WHAT HER PHONE NUMBER WAS, WHICH WAS THE SAME NUMBER AS THAT GIVEN BY THE SUSPECTS OF THE UNRELATED INVESTIGATION.

The trial court overruled Johnson’s hearsay and confrontation objections to the admission of Victoria Stotts’s statement to Detective Hollinger that her phone number was 253-301-8603. [RP 207, 211].

All right Let me rule, put us out of our misery on this. I’m going to overrule the objection. I’m going to allow the testimony about telephone number, not being to the truth of the matter asserted and with insufficient facts to show it was testimonial that (sic) that has been defined by the case law following Crawford. However, I will say it’s a little thin, but at this point, I’m going to overrule the objection.

[RP 208].

This was after the court had similarly overruled Johnson’s hearsay objection to Detective Landwhrle’s testimony that during an unrelated investigation of other suspected drug dealers, Blocher had been provided “with their cell phone number for their source of supply(,)” [RP 67] before

explaining that source of supply means “who they get their methamphetamine from.” [RP 67-68]. The cell phone number was 253-301-8603, which was Stotts’s number. [RP 68]. She never testified at trial.

Over hearsay and confrontation objections, the court also admitted Detective Hollinger’s characterization of the relationship between Johnson and Stotts as boyfriend-girlfriend. [RP 158, 172-73]. In renewing the objection, defense counsel explained:

I do at this point want to renew that objection and move to strike the testimony on that front for essentially the same reason. That is, in fact, his basis of knowledge, as I understand it, is the statement that is Ms. Stotts made, and I think it is hearsay, and also subject to confrontation. I know the Court has already made a ruling. I would ask the Court to reconsider, but I understand if the Court will not.

[RP 172-73].

In explaining its ruling, the court noted that it had initially sustained the objection because the question was, ““What was the relationship?”” [RP 173].

The second time the question was asked, the question was, ““Were you aware of the relationship?”” The witness answered yes. There was no - - that in my mind was sufficient. Where the information came from was not part of the questioning and certainly subject to cross-examination with respect to the knowledge or the depth of his knowledge about the relationship, but I appreciate your desire to put that back on the record.

[RP 173].

01. Hearsay

Hearsay is defined as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). A statement can be either “an oral or written assertion.” ER 801(a). Hearsay is inadmissible unless it falls within certain exceptions, none of which apply in this case. ER 802.

01.1 Stotts’s Statement re Phone Number

Stotts’s statement of her phone number was introduced for the sole purpose of proving the truth of the matter asserted: that the number 253-301-8603 was her number, which was the same number for the source of methamphetamine given by the suspects in the other investigation. Prior to eliciting this, the State had produced evidence that Johnson and Stotts were boyfriend-girlfriend, about which more bellow. Significantly, the 253-301-8603 number was the number Blocher used to arrange the delivery of methamphetamine April 11<sup>th</sup>. [RP 69, 80]. Otherwise, it would not be relevant under ER 401. In this context, Stotts’s phone number is only relevant for the truth of the matter asserted.

//

//

//

01.2 Phone Number for Other Suspects’  
Source for Methamphetamine

When Detective Landwhrle testified that Blocher had been provided the phone number for the other suspects’ source of methamphetamine, he clarified that Blocher “was given the number separate from all Task Force’s detectives. So no Task Force detective was there when it was obtained.” [RP 68-69]. Given this, it can be deduced that Blocher communicated this information to Landwhrle, which makes it not only hearsay but hearsay within hearsay. In instances of double hearsay, each level of hearsay must be independently admissible. ER 805. Here, the statement, either written or oral, to Blocher regarding the phone number was the first level of hearsay, and Blocher’s statement to Landwhrle was the second level. See ER 801(c).

01.3 Boyfriend-girlfriend Relationship

In renewing his objection to Detective Hollinger’s characterization of the relationship between Johnson and Stotts, counsel for Johnson proffered that Hollinger had no basis of knowledge for this other than a statement made by Stotts, which renders the testimony inadmissible hearsay for the same reason argued above vis-à-vis Stotts’s statement concerning her phone number, for there can be no argument that this characterization was not offered for the proof of the

matter asserted. And since Stotts never testified, the court's reasoning that Hollinger was subject to cross-examination takes nothing away from the argument.

02. Confrontation

The Sixth Amendment provides that a person accused of a crime has the right "to be confronted with witnesses against him." Similarly, article I, section 22 of the Washington State Constitution asserts that "[i]n criminal prosecutions the accused shall have the right to ... meet the witnesses against him face to face." Const. art. I, § 22 (amend. 10). In State v. Pugh, 167 Wn.2d 825, 835, 225 P.3d 892 (citing State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998)), our Supreme Court concluded that article I, section 22 is more protective than the Sixth Amendment with regard to a defendant's right of confrontation.

In Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), the United States Supreme Court held that out-of-court testimonial statements by witnesses are inadmissible under the Sixth Amendment's Confrontation Clause if the witness fails to testify at trial, unless the witness is unavailable and the defendant has had a prior opportunity to cross examine the witness. Crawford, 541 U.S. at 59. On appeal, the State has the burden of establishing that statements are

nontestimonial. State v. Koslowski, 166 Wn.2d 409, 417 n.3, 209 P.3d 479 (2009).

In this case, there was no showing that Stotts was unavailable for trial or subject to prior cross-examination. Not only were her statements to Detective Hollinger regarding her phone number and her relationship with Johnson were made “under circumstances which would lead an objective witness reasonably to believe that the statement(s) would be available for use at a later trial,” Crawford, 541 U.S. at 52, but were provided, as argued above, for the sole purpose of providing evidence of the truth of the matters, namely that the telephone number for the source of methamphetamine belonged to Johnson’s girlfriend. Under these circumstances, Johnson was entitled to “be confronted with” the person giving this testimony at trial. Id. at 54.

### 03. Conclusion

A violation of a defendant’s constitutional right of confrontation is harmless error only if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 575 (1989), cert. denied, 475 U.S. 1020, 89 L. Ed. 2d 321, 106 S. Ct. 1208 (1986). Under this test, “a conviction will be reversed where there is any reasonable possibility that the use of inadmissible evidence was necessary to reach a guilty verdict.” State v.

Smith, 148 Wn.2d 122, 139, 59 P.3d 74 (2002) (citing State v. Guloy, 104 Wn.2d at 426). On the other hand, the erroneous admission of evidence of non-constitutional error is prejudicial only if within reasonable probability the outcome of the trial would have been materially affected. State v. Kelly, 102 Wn.2d 188, 685 P.2d 564 (1984).

Someone delivered methamphetamine to Blocher April 11<sup>th</sup> behind some shrubby outside the view of the Task Force's surveillance unit. About this there can be no question. Determining who that person was is more difficult, principally because Blocher's testimony did not go as planned, for whatever reason. As a result, the State was put in a position of marshaling up whatever circumstantial evidence it could to corroborate its contention that it was Johnson who made the delivery to Blocher, and in doing so it fashioned a case, piece by piece, primarily based on the above-contested evidence: (1) The phone number used to arrange the transaction was the source for methamphetamine, at least according to other suspects; (2) the number belonged to Victoria Stotts; (3) Victoria Stotts was Johnson's girlfriend. Whether viewed as an evidentiary error (outcome materially affected) or as a constitutional error (untainted evidence is so overwhelming that it necessarily leads to a finding of guilt), the admission of the contested evidence was not harmless, for the State, after discussing Blocher's contact with the

suspects of another investigation that morning, which is where he obtained the 253-301-8603 number for the methamphetamine source, relied upon it for conviction during closing argument:

So instead, Mr. Blocher gets in touch with this phone number, and that specific phone number was presented, but that's the phone number that Mr. Blocher uses so that he can arrange to do a buy of methamphetamine on April 11, 2012, and that phone number, it's given, Det. Landwehrle (sic) testified to, was that 253 area code number the 253-301-8603, and you will hear a little bit more about it later, but later that number popped up again when Det. Hollinger is provided with that same phone number by Ms. Stotts.

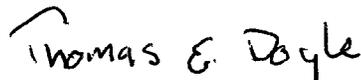
[RP 338].

There is a reasonable doubt that the jury would have reached the same verdict in the absence of the evidence at issue, and the evidence also materially affected the outcome of the trial, with the result that Johnson is entitled to a new trial.

E. CONCLUSION

Based on the above, Johnson respectfully requests this court to reverse and remand for a new trial.

DATED this 23<sup>rd</sup> day of January 2014.



THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

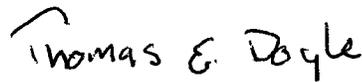
CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

Carol La Verne  
paoappeals@co.thurston.wa.us

Kevin Johnson #860504  
Olympia Corrections Center  
11235 Hoh Mainline  
Forks, WA 98331

DATED this 23<sup>rd</sup> day of January 2014.

Handwritten signature of Thomas E. Doyle in black ink.

THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

# DOYLE LAW OFFICE

**January 23, 2014 - 2:29 PM**

## Transmittal Letter

Document Uploaded: 451786-Appellant's Brief.pdf

Case Name: Sate v. Johnson

Court of Appeals Case Number: 45178-6

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Thomas E Doyle - Email: **ted9@me.com**

A copy of this document has been emailed to the following addresses:

LavernC@co.thurston.wa.us