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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
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29086-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JOHNNY C. MENDOZA, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

---

APPELLANT'S BRIEF

---

Julia A. Dooris  
Attorney for Appellant

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(509) 838-8585

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#### A. ASSIGNMENTS OF ERROR

1. The trial court erred by imposing sentence enhancements for delivery within a school bus stop zone.
2. The trial court erred by imposing a sentence that exceeded the statutory maximum.
3. The prosecutor committed misconduct in closing argument by vouching for the police officers.

#### B. ISSUES

1. May the police effectively increase an offender's punishment by arranging a controlled buy within a protected zone that triggers a sentence enhancement?
2. When an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime, should this Court vacate the sentence and remand for imposition of a sentence that complies with the relevant statutes?
3. Where the prosecutor offers a personal opinion that vouches for the police officers, does the prosecutor commit misconduct?

### C. STATEMENT OF THE CASE

On May 26, 2009, a confidential informant for the Kennewick Police Department set up a controlled buy operation. (RP 61) The police informant arranged when and where the deal would occur. (RP 62) The informant set up the deal in the parking lot of Kamiakin High School. (RP 41)

At the scene were Kennewick police Detectives Randy McCalmant, Dawn French, Frank Black and Aaron Clem. The detectives searched the informant and the car, and then watched as the informant picked up a Hispanic man, drove a short distance, and delivered the man back to the street. (RP 9; 16; 36; 45; 52) The informant returned with methamphetamine. (RP 15; 81)

Again, on June 3, 2009, the confidential informant arranged another controlled buy operation, this time at 4302 West Hood Street in Kennewick. (RP 57, 63) Detective Frank Black watched the informant arrive in his car, and saw a Hispanic male approach the passenger window and make contact. (RP 78) Detective Caughey reported the informant returned with methamphetamine. (RP 58-63)

The detectives identified the Hispanic male in each transaction as Johnny C. Mendoza. (RP 40; 70; 75) Mr. Mendoza was ultimately

charged with two counts of delivery, along with two school bus zone allegations. (CP 3-4)

Prior to trial, Mr. Mendoza moved to dismiss because the State had provided notice that it would not be calling the confidential informant as a witness. (CP 6-7; RP 5/17/09 1-8) The court denied the motion, and ruled that the officers could not testify about anything the informant said, but could testify about what they saw. (RP 5/17/09 7-8)

During closing argument, the prosecutor told the jury they had to believe the police officers:

Given the testimony of these officers and their refusal to put any sharp edges on it that don't belong, I think that you have to find them credible. They're not mistaken. They're not shading their testimony, and they're not lying.

(RP 109-110)

On rebuttal, the prosecutor attacked defense counsel's credibility:

I'd like to thank counsel for his tortured version of the facts. I could have objected... (but referred the jury to their respective memory). (RP 121)

\* \* \*

Counsel's suggesting that to you that these men of law enforcement -- and you heard their testimony, so you decide whether that's an emotional appeal or whether I'm the one that's wound up, but after you consider the testimony of the law enforcement officers, find this man guilty. Thank you.

(RP 122)

Mr. Mendoza was convicted. (CP 62, 64) The jury found that the deliveries had taken place within 1,000 feet of a school bus stop. (CP 63, 65) Mr. Mendoza was sentenced to 114 months incarceration, plus up to 12 months community custody, for a total sentence of ten and one-half years. (CP 78) He appeals.

#### D. ARGUMENT

1. WHEN THE POLICE ARRANGE A CONTROLLED BUY WITHIN A SCHOOL ENHANCEMENT ZONE, THE STATE FAILS TO MEET ITS BURDEN OF PROOF BEYOND A REASONABLE DOUBT THAT THE TARGET VOLITIONALLY DELIVERED DRUGS INSIDE THE ENHANCEMENT ZONE.

Generally, every crime must contain two elements: (1) an *actus reus* and (2) a *mens rea*. *State v. Eaton*, 168 Wn.2d 476, 229 P.3d 704 (2010). *Actus reus* is “the wrongful deed that comprises the physical components of a crime... and the *mens rea* is the state of mind that the prosecution . . . must prove that a defendant had when committing a crime.” *Id.* (citations omitted)

Although an individual need not possess a culpable mental state in order to commit a crime, “a certain minimal mental element [is] required in order to establish the *actus reus* itself.” *Id.*, quoting *State v. Utter*,

4 Wn. App. 137, 139, 479 P.2d 946 (1971)). For example, movements must be willed; a spasm is not an act. *Eaton*, at 481.

“It is this volitional aspect of a person’s actions that renders her morally responsible and her actions potentially deterrable. To punish an individual for an involuntary act would run counter to the principle that a person cannot be morally responsible for an outcome unless the outcome is a consequence of that person’s action.” *Id.* (*quotations omitted*) (*citing* A.P. Simester, On the So- called Requirement for Voluntary Action, 1 Buff. Crim. L. Rev.. 403, 405 (1998).

To punish an individual for an involuntary act would create what Simester terms “situational liability,” penalizing a defendant for a situation she simply finds herself in.” *Eaton*, at 482, *quoting* Simester, 1 Buff. Crim. L. Rev. at 412. *Id.* at 410. “Unless there is a requirement of voluntariness, situational offenses are at odds with the deepest presuppositions of the criminal law.” *Id.* at 412.

In *Eaton*, the Washington Supreme Court struck a sentence enhancement for possession a controlled substance within the jail because officers failed to search the defendant prior to taking him to jail. The Court held that to impose a sentence enhancement under those circumstances would lead “to an unlikely, absurd, and strained consequence, imposing a strict liability sentence enhancement for

involuntary possession of a controlled substance in a county jail or state correctional facility.” *Eaton*, 168 Wn.2d at 484 (citation omitted).

Significantly, the *Eaton* court expressed its doubt that the legislature intended to give the police broad authority to affect a defendant’s punishment after arrest: “We doubt the legislature intended to grant the police such broad authority to affect the defendant’s punishment after arrest. Additional punishment for being in an enhancement zone serves no logical purpose unless we presume that its infliction was intended only where the defendant could have avoided being there.” *Id.*

The *Eaton* court explained “[N]othing in our opinion should be read as requiring that the State prove a defendant intended to be in the enhancement zone or even that she knew she was in the enhancement zone. The State must simply demonstrate that the defendant took some voluntary action that placed him in the zone.” *Eaton*, at fn. 5.

Finally, the *Eaton* court held that RCW 9.94A.533(5) encompasses a volitional element that the State must prove beyond a reasonable doubt. *Eaton*, 143 Wn.2d at 484, citing *State v. Boyer*, 91 Wn.2d 342, 344, 588 P.2d 1151 (1979) (finding an implied element of guilty knowledge in the crime of delivery of a controlled substance).

The same reasoning should apply to RCW 69.50.435, the school zone enhancement that was added in this case. The State bears the burden

of proving each element beyond a reasonable doubt. When a person is found within an enhancement zone in possession of a controlled substance, the State is entitled to a permissive inference that the person is within the zone of his own volition. *See State v. Cantu*, 156 Wn.2d 819, 822, 132 P.3d 725 (2006) (permissive inferences permitted because they do not relieve the State of its burden of proof).

However, while possession within the enhancement zone allows a fact finder to infer volition, the inference alone may not be enough for the State to meet its burden. *State v. Hanna*, 123 Wn.2d 704, 710, 871 P.2d 135 (1994). Here it was not because the State agent – the absent informant – arranged the buy within the protected zone.

As stated by the *Eaton* court:

Allowing the State to bootstrap additional punishments to the underlying crime where the defendant has done nothing to create the aggravating circumstance would run counter to the notions of justice that serve as the backdrop for our criminal law. While the enhancement in this case was not, strictly speaking, a separate crime, it still requires proof that the defendant did something separate.

In this case, Mr. Mendoza did nothing separate, or intentionally. Instead, the police set up the arranged buy within a protected zone. Allowing the police to arrange for a controlled buy within a protected zone gives the police the authority to affect the defendant's punishment after

arrest, a result that *Eaton* found untenable. This court should apply the *Eaton* reasoning to this case and reverse the sentence enhancements.

2. THE TOTAL TERM OF CUSTODY EXCEEDS  
THE MAXIMUM SENTENCE FOR THE  
OFFENSE.

The trial court erred in imposing a total sentence that exceeded the statutory maximum. Delivery of a controlled substance, methamphetamine, is a Class B felony. RCW 69.50.401(2)(b). The maximum sentence for that crime is ten years. RCW 69.50.401(2)(b). RCW 9A.20.021(1)(c). Mr. Mendoza's court-imposed sentence of 114 months confinement plus 12 months community custody totals 126 months, which exceeds ten years by six months.

“Whenever an offender’s standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime . . . [t]he term of community custody . . . shall be reduced by the court” to comply with RCW 9A.20.021. RCW 9.94A.701(8), Laws of 2009, ch. 375, § 5.

Where a sentence is insufficiently specific regarding community custody, an amended sentence is the appropriate remedy. *In re Brooks*, 166 Wn.2d 664, 673, 211 P.3d 1023 (2009) citing *State v. Broadway*, 133 Wn.2d 118, 136, 942 P.2d 363 (1997). In order to comply with

RCW 9.94A.707(8), Mr. Mendoza's sentence must be reduced so it does not exceed the maximum term.

3. THE PROSECUTOR ENGAGED IN MISCONDUCT IN CLOSING ARGUMENT BY VOUCHING FOR THE TESTIFYING POLICE OFFICERS.

The court reviews allegations of prosecutorial misconduct for an abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996), vacated on other grounds in *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001). The defendant bears the burden of establishing that the conduct complained of was both improper and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). Misconduct constitutes prejudicial error if a substantial likelihood exists that the misconduct affected the jury's verdict. *Stenson*, 132 Wn.2d at 718-19.

If trial counsel did not object to misconduct, a defendant must show the misconduct was so flagrant and ill-intentioned that no curative instruction would have corrected the possible prejudice. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

The court reviews a prosecutor's comments during closing argument in the context of the total argument, the issues in the case, the

evidence addressed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). During closing argument, a prosecutor has “wide latitude in drawings and expressing reasonable inferences from the evidence.” *State v. Hoffman*, 116 Wn.2d 51, 94-95, 804 P.2d 577 (1991). But it is improper for a prosecutor to vouch for a witness’s credibility. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Vouching may occur in two ways: the prosecution may place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness’s testimony. *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980).

The court will find improper vouching when it is clear that the prosecutor is not arguing an inference from the evidence, but instead is expressing a personal opinion about credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

In *Warren*, the prosecutor argued that (1) certain details about which the complaining witness testified were a “badge of truth” and had a “ring of truth,” and (2) specific parts of the witness’s testimony “rang out clearly with truth in it.” *Warren*, 165 Wn.2d at 30. Our Supreme Court held that this argument was proper because it was based on the evidence

presented at trial rather than on personal opinion. *Warren*, 165 Wn.2d at 30.

This case presents different facts that require a different result. In this case, the prosecutor explicitly told the jury that they had to find the officers credible. The prosecutor added in the personal opinion that the officers were “not mistaken” and “not lying.” (RP 110) On rebuttal, the prosecutor attacked the credibility of defense counsel, sarcastically thanked defense counsel for “his tortured version of the facts” and told the jury that he could have objected. (RP 121)

The prosecutor’s misconduct was so flagrant and ill-intentioned that a jury would not have been able to disregard it, had defense counsel objected and required a curative instruction.

#### E. CONCLUSION

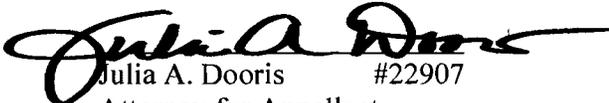
The sentence enhancements should be reversed because the police wholly controlled where the transaction would occur. Additionally, Mr. Mendoza’s sentence exceeds the statutory maximum, and must be amended. Finally, the prosecutor vouched for the officers in closing

argument, and this misconduct was so flagrant and ill-intentioned that Mr.

Mendoza is entitled to a new trial.

Dated this 22nd day of December, 2010.

GEMBERLING & DOORIS, P.S.

  
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Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 29086-7-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JOHNNY C. MENDOZA,	)	
	)	
Appellant.	)	

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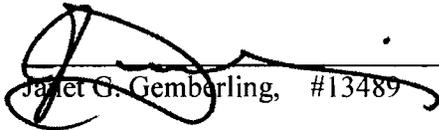
I certify under penalty of perjury under the laws of the State of Washington that on December 22, 2010, I mailed copies of Appellant's Brief in this matter to:

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Signed at Spokane, Washington, on Wednesday, December 22,  
2010.

  
J. G. Gemberling, #13489