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Court of Appeals
Division III
State of Washington

No. 31027-2-III

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

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

THOMAS ROBERT HUDLOW,
Defendant/Appellant.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Vic L. VanderSchoor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Mr. Hudlow was denied a fair trial by admission of hearsay testimony that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

2. Mr. Hudlow was denied a fair trial and effective assistance of counsel when his attorney failed to object to damaging hearsay testimony and improper closing argument.

3. The prosecutor committed misconduct in closing and the trial court erred in overruling Mr. Hudlow's objection to allowing the prosecutor to comment on Mr. Hudlow's constitutional right to remain silent and imply the defense has a duty to present evidence.

4. The trial court violated the defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against him for a crime unsupported by substantial evidence.

5. The defendant's conviction was based on insufficient evidence.

6. Mr. Hudlow was denied a fair trial due to cumulative error.

7. The record does not support the implied finding that the defendant has the current or future ability to pay Legal Financial Obligations.

8. The trial court erred by imposing a variable term of community custody as part of the sentence.

Issues Pertaining to Assignments of Error

1. Was Mr. Hudlow was denied a fair trial by admission of hearsay testimony that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution?

2. Was Mr. Hudlow denied a fair trial and effective assistance of counsel when his attorney failed to object to damaging hearsay testimony and improper closing argument?

3. Was the prosecutor's misconduct in closing by commenting on the constitutional right to remain silent and implying the defense has a duty to present evidence harmless beyond a reasonable doubt?

4. Does cumulative error depriving Mr. Hudlow of a fair trial as guaranteed by Wash. Const. art. I, §§ 21 and 22 require a new trial?

5. Does a trial court violate a defendant's right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it enters judgment against him for a crime unsupported by substantial evidence?

6. Under the law of the case, the state was required to prove that the defendant knew he was delivering Methamphetamine. The state

proved (at best) that the defendant delivered a controlled substance. Was the evidence insufficient to prove the elements of the offense beyond a reasonable doubt?

7. Should the implied finding that the defendant has the current or future ability to pay Legal Financial Obligations be stricken from the Judgment and Sentence as clearly erroneous where it is not supported in the record?

8. Did the sentencing court lack statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody?

B. STATEMENT OF THE CASE

The defendant, Thomas Robert Hudlow, was convicted by a jury of delivery of a controlled substance—methamphetamine within 1,000 feet of a school bus zone, as charged. CP 15, 70–71. The incident occurred on July 25, 2011, when members of the Tri-City Metro Drug Task Force with assistance of some outside agencies conducted a single controlled buy using a confidential informant (“CI”). The controlled buy was to take place in the Jack in Box parking lot in Kennewick, Washington. The intended target was Mr. Hudlow. Affidavit of Probable Cause at CP 3–4;

7/10/12 RP 12, 16, 48, 51, 85–86, 90. The CI did not testify at trial.¹ Nor did Detective Berry Duty, the Case Agent responsible for processing and overseeing the CI. 7/10/12 RP 8–150; 7/11/12 RP 151–67.

The general procedure for using a confidential informant was described by Franklin County Sheriff's Detective Todd Carlson. A “controlled buy” is when a CI is authorized to purchase narcotics under law enforcement supervision. 7/10/12 RP 9–10. A person wishing to sign up as a CI undergoes a background check for crimes of dishonesty that might disqualify him or her from use as a CI, although there are no “absolutes” and decisions are made on a case by case basis. 7/10/12 RP 30–32. If hired, a CI is usually working under a “contract” (a deal of some sort to work off charges) or as a mercenary (being paid for services). 7/10/12 RP 33–37. Contracts are usually for six months, may involve multiple required buys and targets, and may be extended. CIs can often move back and forth between working under contract or as a mercenary. 7/10/12 RP 36. Under either category, CIs are not actively monitored or required to do drug testing, and Det. Carlson acknowledged that while

¹ At time of trial, the CI was incarcerated at the Washington State Penitentiary in Walla Walla Washington. 7/10/12 RP 79.

working as CIs, some have actually engaged in illegal activities possibly including the purchase of illegal drugs. 7/10/12 RP 37–38.

Det. Carlson testified that usually informants offer individuals as targets, after being asked who the CI could purchase drugs from on a regular basis. 7/10/12 RP 14. Police try to rule out personal vendettas or family conflicts, relying on their own investigation and the informant's self-reporting. 7/10/12 RP 38. Although the detective believed this CI was working under a contract, only (non-testifying) Case Agent Det. Duty would know the specifics of the contract or any background checks. 7/10/12 RP 39, 48. Det. Carlson was “not privy [to] or made aware of details concerning the [CI], his relationship to the target or the details [of] his contract”, including the possibility that Mr. Hudlow and the CI might have a girlfriend in common. 7/10/12 RP 43. He had no idea which buy the transaction here was, either in the CI's contract or with respect to Mr. Hudlow as a target. 7/10/12 RP 42–43. Det. Carlson knew Mr. Hudlow was the intended target, but only Case Agent Det. Duty would know if the CI had supplied Mr. Hudlow's name. 7/10/12 RP 12, 14. The detective also didn't know if the location of this buy was chosen by the Metro Drug Task Force or the CI. 7/10/12 RP 44–47. CIs are assigned to a given detective—here, Det. Berry Duty—who as the case agent is responsible

for any investigation involving his or her CI and would have the most knowledge about the CI. 7/10/12 RP 49–50.

Det. Carlson described the general procedure used in a controlled buy. Before a transaction occurs, the CI would be strip-searched to ensure no illegal drugs are hidden. The CI would be shown a photograph of the intended target and asked to identify the target by name or street name. The CI would then be given prerecorded buy money. Police would drop the CI off at the buy location and try to keep the CI under observation in an effort to see the CI has no contact with anyone other than the target and no opportunity to obtain drugs other than from the target. Upon the CI's return to the police location, the CI would again be searched and would turn over any drugs and/or left over buy money. The CI would be released, and the drugs field-tested. 7/10/12 RP 10–11, 18.

In this particular controlled buy, Det. Carlson and Case Agent Det. Duty picked the CI up around 2:20 p.m. from a pre-designated location. Det. Carlson did not recall what the CI was wearing or what location they picked the CI up from. 7/10/12 RP 18, 59. Det. Carlson didn't know the CI's whereabouts before the controlled buy occurred. 7/10/12 RP 79. Once in the patrol car, a single phone call was made by the CI.

Before trial, and outside of the presence of the jury, defense counsel conducted voir dire examination of Detective Carlson regarding his hearsay concerns about upcoming testimony of the witness regarding the phone call. After being sworn in, Det. Carlson said he observed the CI dial two calls. The first went unanswered. Regarding the second call, the detective noted in his report the CI told him that the target said he would be en route in approximately five minutes. Det. Carlson assumed Mr. Hudlow was the person called, because he was the target in the case and the detective “did not have any other information from the case detective that it would not be Thomas Hudlow.” In argument, the prosecutor noted “[W]e are not trying to marry up the number with the defendant. We are not able to do that. Our testimony will be [that] contact was made, that Mr. Hudlow was the intended target, and [] a couple [of] officers here [] will positively identify [Mr. Hudlow] as the one [who] showed up.” The court ruled that hearsay prohibited the detective from saying what phone number was dialed or who was contacted, but the detective would be allowed to say the target in the investigation was Mr. Hudlow. As to any other questions, the court reserved, saying it needed to know exactly what the question would be before ruling on it. 7/10/12 RP 5-7.

The jury came in, and Detective Carlson was the first witness. In part, he testified as follows:

[Prosecutor]: Based on the information that you received, did you witness a phone call shortly before this purchase of methamphetamine from this defendant?

[Det. Carlson]: I did.

Q: And what arrangements did you understand had been made?

[Defense Attorney]: Based on hearsay.

(Prosecutor): Not being admitted for the truth. It's being admitted on how he contacted.

[Defense Attorney]: Still hearsay.

[Court]: Sustained. He can indicate what he observed.

Q: There was a phone call; is that right?

A: Correct.

Q: And did you listen in on that phone call?

A: I did.

Q: Were arrangements made to purchase drugs?

A: Correct.

Q: Were arrangements made to purchase a specific drug?

A: Correct.

Q: What was that drug specifically?

A: Specifically, the drug that was intended to be purchased on this day was methamphetamine.

Q: Were arrangements made to purchase that specific drug at a specific place?

A: It was.

Q: What was that place?

A: That specific place was the Jack in the Box located on West Clearwater Avenue in Kennewick.

Q: And subsequently were arrangements made to have that transaction occur at a specific time?

A: It was.

Q: And what was that time.

A: Somewhere around [2:30 p.m. on February 25th].

7/10/12 RP 15–16. During cross-examination, Det. Carlson testified the arrangement to meet at the Jack in the Box area had actually been set

previously, during an earlier phone call to which he was not privy.

7/10/12 RP 65. In this call he did not see the number dialed by the CI, and heard the CI say only something like, “are you on your way” or “are you coming”. 7/10/12 RP 65. The detective would have written it down in his report if the CI made any specific references to drugs. His report had no such references. 7/10/12 RP 65.

Detective Carlson strip-searched the CI and took some money from his person. 7/10/12 RP 16–17, 62–63, 74.

[Prosecutor]: And having done that, what did you do next?

[Det. Carlson]: After the informant was searched?

Q: Yes.

A: The informant was then asked to identify the target as being the person from whom he planned to purchase narcotics on that day.

Q: At that point did you procure [sic] a photograph?

A: Correct. We displayed a photograph to the informant of the target who was identified as Thomas Hudlow.

7/10/12 RP 16–17. The CI was given \$110 as “buy money”. 7/10/12 RP 9, 63. The three left the pre-designated location at 2:32 p.m. and went to the central area of the WINCO parking lot. 7/10/12 RP 18–19, 63, 71.

The CI exited the police vehicle at 2:49 p.m. 7/10/12 RP 19, 66. The distance from Det. Carlson’s position in the WINCO parking lot to the Jack in the Box parking lot was 300 to 500 yards, and trees, bushes and a short fence further obstructed views of the CI, who was soon out of the detective’s sight. 7/10/12 RP 67, 72, 83. Det. Carlson was not positioned

in a location to see any delivery or observe Mr. Hudlow's vehicle at the buy location. 7/10/12 RP 69–70.

Kennewick Police Detective Sargent Kirk Isakson was located in the lobby of the Jack in the Box. At approximately 2:58 p.m. he saw the CI emerge from the WINCO parking lot near a green belt area (with trees, bushes and a fence) to an island (with a light pole and trees) in the Jack in the Box parking lot, and stay there while pacing back and forth. About the same time the detective saw Mr. Hudlow, who he knows, drive a white car into the lot and park near the island. The CI walked over and got in the front passenger side. The car remained parked there. Det. Sgt. Isakson's view was limited to seeing the occupants only from their chests upward. The detective agreed it would be very difficult to see a package this size (1-1/2 inches by 1-1/2 inches, the size of a flattened golf ball) handed off in an automobile. Within a minute to a minute and a half of contact, the two shook hands and the CI got out and walked back toward the WINCO lot. Mr. Hudlow drove off. The detective had seen the two looking down and saw the "shoulder and hand kind of like moving back and forth" but did not see a hand off. 7/10/12 RP 19–20, 69, 89, 90, 92–96, 100, 102–03, 120.

The white car had arrived with its rear left window broken out. 7/10/12 RP 94. The fact a target was driving a bashed-in car would be an important detail for police to consider. 7/11/12 RP 166. Police were also aware the CI knew the white car was the vehicle Mr. Hudlow usually drove. Police had no idea where the white car had been prior to its being at the Jack in the Box area at the time of the transaction and had no knowledge of the CI's whereabouts before the controlled buy occurred. 7/10/12 RP 79, 106–07.

Kennewick Police Detective Christopher Lee was parked in his car in the western portion of the WINCO lot, about halfway between Det. Carlson's car and the Jack in the Box. He did not see the CI until the CI emerged in the restaurant's parking lot and eventually stood in the island. The white car drove around his car and pulled up to the island, whereupon the CI entered the passenger door and closed it. 7/10/12 RP 110, 112–15, 118–19. In contrast to Det. Sgt. Isakson's testimony, Det. Lee testified the white car did not remain still but instead pulled forward 10 to 15 feet and parked in the very first stall next to the restaurant's door. After a "brief interaction" of less than a minute, the CI got out and walked away with the white car following in the same direction. 7/10/12 RP 115–16. Only at this point did Det. Lee recognize the driver as Mr. Hudlow, whose picture

he'd been shown earlier that day. 7/10/12 RP 111, 114, 116. Det. Lee did not see any delivery take place. 7/10/12 RP 121.

West Richland Police Detective Thomas Grego was parked in the eastern portion of the WINCO lot. The CI came into his view 30 to 60 seconds after Det. Carlson radioed that the CI had been let out of the police car and was headed towards the Jack in the Box lot. 7/10/12 RP 123–25, 129. After Det. Lee announced its arrival, Det. Grego sighted the white car approaching the lot. The detective did not have continuous surveillance of the CI or the white car due to traffic in and out of the WINCO lot. He did not see the CI enter or walk away from the white car, or make contact with anyone. 7/10/12 RP 126–27, 134.

Detectives Dawn French and Steven Thatsana were also involved in the surveillance, and Special Agent Hernandez and Officer Jason Whitney apparently assisted in perimeter surveillance and followed the target after the transaction—none of them testified at trial. 7/10/12 RP 48, 51, 70, 85–86, *passim*; 7/11/12 RP *passim*.

The CI was away from undercover car for approximately 17 minutes, and returned at 3:06 p.m. with a baggie later found to contain methamphetamine. 7/10/12 RP 18–20. The CI was searched. No buy funds were ever recovered. 7/10/12 RP 16–17; 71.

By amended information the State charged Mr. Hudlow with delivery of a “controlled substance, to wit: methamphetamine”. CP 15. As proposed by the State, the court instructed the jury in pertinent part as follows:

INSTRUCTION NO. 10

To convict the defendant of the crime of delivery of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about February 25, 2011 the defendant delivered a controlled substance;
- (2) *That the defendant knew that the substance delivered was a controlled substance methamphetamine;* and
- (3) That this act occurred in the State of Washington.

If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 45, 64 (emphasis added); 7/11/12 RP 168.

In closing, the State argued in part:

Second [element of the to-convict instruction] is that the defendant knew that the substance delivered was a controlled substance methamphetamine. There is no reason for somebody to be surreptitious. The reason these transactions occur the way they do is that it’s a felony to commit these offenses. It has legal consequences and if you are going to deal in this particular conduct you had better not get caught.

So I pose there could be a situation where “A” might give a parcel to “B” and tell “B” that he was returning some object, a notary seal or nutcracker or something that was not criminally possessed and “B” would take it over there and deliver it. Now if you will, he will be delivering a controlled substance but without knowledge. That is not the situation here either. ...

7/11/12 RP 179.

... Counsel faults the phone calls that Detective Carlson really doesn't know what number was dialed or who they talked to. Yes, I guess that is a real leap of faith. When the call was made we jolly well know who showed up and it was the defendant. And the defendant drives into a stall in the parking lot and the informant gets into the car and there is a transaction that takes maybe as long as a minute.

Now you have an instruction [-] direct and circumstantial evidence [-] and that's fine. You were told one is not necessarily better than the other so it's your job to decide what weight an[d] credibility you will give to the evidence. But that informant is inside that car for less than a minute and there is some sort of movement that would suggest that the people in the car, the defendant and the informant are studying an object and there is an exchange and he is out of the car and guess what. He has a gram, at least it was a gram when Charles Soloman [the forensic scientist²] measured it of methamphetamine that he didn't have before and he is light 120³ dollars. Now I find myself parking in parking lots of establishments and I go inside. I meet somebody and they go inside or we do whatever. There is no explanation, lawful explanation and there has been none. Counsel can only argue that there might be some lawful explanation for this. There is no testimony on this record. You are only asked to have conjecture. To sum up some phantom about what that might have been. The only thing I can think of is they are in [the car], they did one round of the rock, paper, scissors ---

[Defense attorney]: Your Honor, I object. [The prosecutor] is commenting on my client's right to remain silent and [my] efforts when [it is the prosecutor who] refused to call the CI [as a witness].

[The Court]: Object[ion] noted. Go ahead.⁴

[Prosecutor]: There is no reason for this defendant to be in the parking lot except to get \$120[sic] for a gram of methamphetamine

² 7/10/12 RP 144-50.

³ The testimony was that \$110 was given as "buy money". 7/10/12 RP 9, 63.

⁴ The court's response apparently meant the objection was overruled. See 7/11/12 RP 185.

and that is it. Counsel is going to argue that evidence can be lack of evidence. Well, the only evidence that you have before you is that this controlled buy went down as it was planned and that the defendant showed up. There [were] no drugs before and after the defendant did his part of it, which took him less than a minute and there is methamphetamine. Counsel wants to say that it was secreted. I don't know that there was some sort of fraud practiced on this defendant. You have no evidence of that. Counsel is going to ask you to make conjecture. I'm asking you to make a determination based on the facts that are before you and find a drug dealer guilty.

7/11/12 RP 183–84. In rebuttal closing, the prosecutor argued in part:

... The cell phone. I have a cell phone in my pocket and there is a number, ladies and gentlemen, in a cell phone and I can dial that number and I can speak to someone you won't know who and in a matter of minutes hot pepperoni mushroom pizza will show up in the courtroom assuming they can get it through security and what [the defense attorney] asked you to believe [is] maybe I didn't call pizza delivery. I didn't tell them where it should show up and bring it and the rest of it.

... [T]here is this notion that the simplest solution is the right one and that's what we have. We have no methamphetamine. We send the informant out there. Defendant shows up quick like a bunny and a minute later we have methamphetamine.

... [The defendant] has face[d] and cross-examined his accusers in response to this particular charge. The simple explanation for this particular case, the simple explanation, the one that rings true is that the defendant is guilty. ... The target is a known drug dealer. He was there because the informant knew he was a drug peddler and he came to the Jack in the Box and he delivered the stuff just right on like he intended. ... There is one conclusion. It's the simple and direct conclusion this defendant drove into the parking lot and delivered a gram of methamphetamine for \$120 [sic] and left again. He is guilty

7/11/12 RP 198–200.

At sentencing the court imposed a low-end standard range sentence of 14 months and a school zone enhancement of 24 months, for a total term of confinement of 38 months. CP 74, 77.

The trial court imposed the following term of community custody as part of Mr. Hudlow's sentence:

(A) The defendant shall be on community placement or community custody for the longer of:

- (1) the period of early release. RCW 9.94A.728(1), (2); or
- (2) the period imposed by the court, as follows:
... 12 months;

CP 77 at ¶ 4.5.

The court also ordered a total amount of Legal Financial Obligations ("LFOs") of \$2,930. CP 75, 82. The court made no express finding that Mr. Hudlow had the present or future ability to pay the LFOs. 7/25/12 RP 2-5; *see* CP 74-75 at ¶ 2.5. However, the Judgment and Sentence contained the following pertinent language by the Court:

¶ 2.5 Ability to Pay Legal Financial Obligations. The court has considered the total amount owing, the defendant's past, present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.

CP 74. The court made no inquiry into Mr. Hudlow's financial resources and the nature of the burden that payment of LFOs would impose. 7/25/12 RP 2-5. The court ordered Mr. Hudlow to begin making monthly

payments on the LFOs commencing immediately and that he pay up to \$50 per month to be taken from any income earned while in DOC custody. CP 76 at ¶ 4.1.

This appeal followed. CP 84.

C. ARGUMENT

1. Mr. Hudlow was denied a fair trial by admission of hearsay testimony that violated the confrontation clause under the Sixth Amendment and Article I, section 22 of the Washington Constitution.

The Sixth Amendment Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. This right is made binding on the states through the Fourteenth Amendment. Pointer v. Texas, 380 U.S. 400, 403, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Article I, section 22 of the Washington Constitution similarly provides, "[i]n criminal prosecutions the accused shall have the right ... to meet the witnesses against him face to face." In State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006), our Supreme Court concluded that article I, section 22 can offer higher protection than the Sixth Amendment with regard to a defendant's right of confrontation. Id. at 391-92, 128 P.3d 87

(citing State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998)). An alleged violation of the Confrontation Clause is subject to de novo review. Lilly v. Virginia, 527 U.S. 116, 137, 119 S.Ct. 1887, 144 L.Ed.2d 117 (1999); State v. Kirkpatrick, 160 Wn.2d 873, 881, 161 P.3d 990 (2007). A Confrontation Clause violation may be raised for the first time on appeal. State v. Hieb, 107 Wn.2d 97, 108, 727 P.2d 239 (1986); RAP 2.5(a)(3) (manifest error affecting a constitutional right).

Until the Supreme Court decided Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), hearsay statements made by unavailable declarants were admissible if an adequate indicia of reliability existed, i.e., they fell within a firmly rooted hearsay exception or bore a “particularized guarantee of trustworthiness.” Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980), *overruled by* Crawford, 124 S. Ct. 1371 (2004).

Under Crawford, “[w]here non-testimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . as would an approach that exempted such statements from Confrontation Clause scrutiny altogether.” Crawford, 124 S. Ct. at 1374. The State can present non-testimonial hearsay under the Sixth Amendment subject only to evidentiary rules.

Davis v. Washington, 547 U.S. 813, 821, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006).

But if testimonial hearsay evidence is at issue, the Confrontation Clause requires witness unavailability and a prior opportunity for cross-examination. Crawford, 124 S. Ct. at 1374. After Crawford, a state's evidence rules no longer govern confrontation clause questions. *See* United States v. Cromer, 389 F.3d 662, 679 (6th Cir.2004). The State has the burden on appeal of establishing that statements are non-testimonial. State v. Koslowski, 166 Wn.2d 409, 417 n. 3, 209 P.3d 479 (2009).

a. The challenged testimony is inadmissible “backdoor” hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). Hearsay is inadmissible as evidence, with a few well-established exceptions. ER 802; Whelchel v. Wood, 966 F.Supp. 1019, 1024 (E.D.Wash. 1997), *aff'd sub nom. Whelchel v. Washington*, 232 F.3d 11979 (9th Cir. 2000). The trial court's factual determination of whether a statement falls within an exception to the hearsay rule will not be disturbed absent an abuse of discretion. State v. Strauss, 119 Wn.2d 401, 417, 832 P.2d 78 (1992). A court reviews de novo whether the court's ruling rests on an erroneous understanding of the law. State v. Walker, 136 Wn.2d 767, 771–72, 966 P.2d 883 (1998).

Attempting to eliminate a hearsay problem by rephrasing questions in a way that avoids direct quotes from the declarant is wrong. In State v. Martinez, this Court held, “Inadmissible evidence is not made admissible by allowing the substance of a testifying witness’s evidence to incorporate out-of-court statements by a declarant who does not testify. United States v. Sanchez, 176 F.3d 1214, 1222 (9th Cir. 1999) (*citing* United States v. Check, 582 F.2d 668, 683 (2d Cir. 1978)).” Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001).

In Check, the State asked a police officer to recount-without telling the court what the absent informant actually said-what the officer’s reactions were and what the state of his knowledge was after the informant spoke. This was “a transparent conduit for the introduction of inadmissible hearsay information obviously supplied by and emanating from the informant” Check, 582 at 678.

Here, State elicited testimony that Det. Carlson was present when the CI made a phone call from the patrol car shortly before the controlled buy was to take place. The court sustained defense counsel’s objection based on hearsay when the witness was asked “what arrangements did you understand had been made”, but noted the witness could indicate what he observed. The State regrouped and continued examination:

[Prosecutor]: There was a phone call; is that right?

[Det. Carlson]: Correct.

Q: And did you listen in on that phone call?

A: I did.

Q: *Were arrangements made to purchase drugs?*

A: *Correct.*

Q: *Were arrangements made to purchase a specific drug?*

A: *Correct.*

Q: *What was that drug specifically?*

A: *Specifically, the drug that was intended to be purchased on this day was methamphetamine.*

Q: *Were arrangements made to purchase that specific drug at a specific place?*

A: *It was.*

Q: *What was that place?*

A: *That specific place was the Jack in the Box located on West Clearwater Avenue in Kennewick.*

Q: *And subsequently were arrangements made to have that transaction occur at a specific time?*

A: *It was.*

Q: *And what was that time.*

A: *Somewhere around [2:30 p.m. on February 25th].*

7/10/12 RP 15–16 (emphasis added). As in Check, having Detective Carlton testify to the nature of his understanding after listening to the CI's portion of the phone conversation instead of reporting what the CI actually said was simply an attempt to circumvent the rule. The evidence was inadmissible hearsay. Martinez, 105 Wn. App. at 782.

This colloquy is equally disturbing in two other aspects—it elicited “facts” that (1) are contradicted by this same witness’ other sworn testimony and/or (2) are instead out-of-court statements of a second absent declarant being impermissibly offered for the truth of the matters asserted.

First, through this impermissible hearsay exchange the jury heard that the CI made arrangements with someone to purchase drugs, to specifically purchase meth, to meet at the Kennewick Jack in the Box and to meet at a specific time. Coupled with other evidence that Mr. Hudlow was the intended target and he in fact showed up in the parking lot when the CI arrived, it would appear the State had made its case. The problem is that this witness testified in voir dire that he didn't know who the CI called, and testified on cross-examination that he overheard no mention of purchase, or purchase of drugs or purchase of meth or any arrangement to meet at the Jack in the Box. 7/10/12 RP 3-4, 65. Clearly the witness had no personal knowledge of the truth of the matters stated. Based on Det. Carlson's entire testimony, the State's case is considerably weakened without the backdoor hearsay of the CI's testimony. Mr. Hudlow had a right to confront the CI as his accuser.

Second, despite the information conveyed in the cited exchange, Det. Carlson had no firsthand knowledge that the CI talked with Mr. Hudlow in this call or a previous call, or that they discussed the purchase of a drug, much less a specific drug—methamphetamine, or that the CI and Mr. Hudlow had previously arranged to conduct this purported buy at the Jack in the Box Restaurant. According to the detective, it was only

Detective Berry Duty who would have this knowledge (if any). In his role as Case Agent for this CI, only Det. Duty would know the specifics of the CI's contract and his background checks, details of the CI's relationship with Mr. Hudlow, how Mr. Hudlow came to be a target, any prior buys between the two, whether the CI and Mr. Hudlow had at any time in fact discussed purchase of methamphetamine, who chose the location of this controlled buy, or any other details of this particular "controlled buy" police project. 7/10/12 RP 12, 14, 39, 42–47, 48. To the extent the State's hearsay exchange with Det. Carlson may instead be a second-hand rendition of "facts" known only to Case Agent Det. Duty—a second absent declarant being impermissibly offered for the truth of the matters asserted—the exchange remains impermissible backdoor hearsay. Mr. Hudlow had a right to confront Case Agent Det. Duty as his accuser.

In either case, the evidence was inadmissible hearsay. Martinez, 105 Wn. App. at 782.

b. The evidence at issue is testimonial. When a confidential informant gives information to a police officer for use in a criminal investigation, those statements are testimonial; any "formality" in the statements is irrelevant. United States v. Cromer, 389 F.3d 662 (6th Cir. 2004). Here, the challenged evidence was clearly testimonial.

c. The State failed to show the witnesses were unavailable and there was no prior opportunity for cross-examination. The CI did not testify at trial. At time of trial, the CI was apparently incarcerated at the Washington State Penitentiary in Walla Walla Washington. 7/10/12 RP 79. Case Agent Det. Duty also did not testify at trial. 7/10/12 RP 8–150; 7/11/12 RP 151–67. Both witnesses were within the State’s control, and the State failed to produce either or both witnesses for confrontation. Likewise, there was no prior opportunity for cross-examination. Crawford, 124 S. Ct. at 1374.

d. The confrontation violation was not harmless. A confrontation violation is a trial error which must be evaluated in the context of other evidence presented to determine whether it was harmless. Whelchel, 996 F.Supp. at 1024 (citing Arizona v. Fulminante, 499 U.S. 279, 307–08, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)). Harmlessness must be determined on the basis of the remaining evidence. Coy v. Iowa, 487 U.S. 1012, 1021–22, 108 S.Ct. 2798, 101 L.Ed.2d 857 (1988); State v. Palomo, 113 Wn.2d 789, 798–99, 783 P.2d 575 (1989). Washington law requires affirmation of the jury’s verdict only if the “overwhelming untainted evidence” supports the jury’s verdict. State v. Guloy, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985).

Here, the only evidence establishing the “[knowledge] that the substance delivered was a controlled substance—methamphetamine” element of delivery—as instructed—was the officer’s account of the substance of the CI’s (and/or Case Agent Det. Duty’s) out-of-court statements. Without the tainted hearsay, there remains evidence only that Mr. Hudlow was the intended target of the police project and he in fact showed up in the parking lot when the CI arrived. This is not “overwhelming” evidence of guilt and is insufficient to support the conviction for delivery of methamphetamine.

The testimony of the informant and/or Case Agent Det. Duty—presented through Det. Carlson—was inadmissible hearsay, introduced in violation of the confrontation clause. The error was not harmless.

2. Mr. Hudlow was denied a fair trial and effective assistance of counsel when his attorney failed to object to damaging hearsay testimony and improper closing argument made by the state.

The Sixth Amendment and Wash. Const. art. 1, § 22 guarantee effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). A claim of ineffective assistance of counsel raises a constitutional issue which appellate courts review de

novo. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987), citing Strickland, 466 U.S. at 687-88.

To establish ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. Thomas, 109 Wn.2d at 225. The first prong refers to performance that is not reasonably effective under prevailing professional norms. State v. Glenn, 86 Wn. App. 40, 45, 935 P.2d 679 (1997). Prejudice is shown if there is a probability that counsel's errors affected the result. Glenn, 86 Wn. App. at 44. The appellant must also show there was no legitimate strategic or tactical explanation for the attorney's conduct. State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

a. Damaging hearsay evidence. As set forth in the preceding issue, the testimony of the informant and/or Case Agent Det. Duty—presented through Det. Carlson—was inadmissible hearsay, introduced in violation of the confrontation clause. While defense counsel made an initial objection based on hearsay when the witness was asked “what arrangements did you understand had been made”, counsel inexplicably failed to object to continued hearsay as the exchange continued. 7/10/12 RP 15–16.

Considering the first Strickland prong, counsel's performance was deficient under prevailing professional norms. There was no legitimate strategic or tactical explanation for not objecting to this evidence. The State's theory of the case was that Mr. Hudlow knowingly made arrangements and followed through in delivering methamphetamine to the CI in a controlled buy situation. Witnesses with firsthand knowledge established only that Mr. Hudlow was the intended target of the police project and he in fact showed up in the parking lot when the CI arrived. The hearsay testimony that the CI made arrangements with someone to purchase drugs, to specifically purchase meth, to meet at the Kennewick Jack in the Box and to meet at the specific time of this incident amounted to an undeniable connection of the dots in the eyes of the jury. Therefore counsel's performance in not objecting to the hearsay was deficient.

b. Facts not in evidence. During closing, the prosecutor argued facts not in evidence, i.e. that Mr. Hudlow was a known drug dealer. A defendant bears the burden of showing that the prosecutor's remarks were improper. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). If the defendant does so, reversal is required unless "the appellate court determines there is [no] substantial likelihood the misconduct affected the

jury's verdict.” Id. at 718–19. A defendant's failure to object to a prosecutor's improper remark constitutes a waiver, unless the remark was “so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice” that could not have been cured by an instruction to the jury. Id. at 719; *see also* State v. Gentry, 125 Wn.2d at 570, 596, 888 P.2d 1105 *cert. denied*, 516 U.S. 843, 116 S.Ct. 131, 133 L.Ed.2d 79 (1995); State v. Hoffman, 116 Wn.2d 51, 93, 804 P.2d 577 (1991). Where the defendant does not object, the reviewing court must determine whether the prosecutor's comments were so flagrant and ill-intentioned that an enduring prejudice resulted such that a curative instruction could not have been effective. Stenson, 132 Wn.2d at 719. While a prosecutor enjoys wide latitude “in drawing and expressing reasonable inferences from the evidence,” allegedly improper comments must be viewed in the context of the entire argument. Gentry, 125 Wn.2d at 641.

Here, the State presented evidence that in a typical “controlled buy” situation, usually informants offer individuals as targets, after being asked who the CI could purchase drugs from on a regular basis. 7/10/12 RP 14. While Det. Carlson knew Mr. Hudlow was the intended target, he had no knowledge whether the CI had supplied Mr. Hudlow’s name.

7/10/12 RP 12, 14. Thus there was no evidence that Mr. Hudlow was a drug dealer. In closing, however, the State argued otherwise:

Second [element of the to-convict instruction] is that the defendant knew that the substance delivered was a controlled substance methamphetamine. There is no reason for somebody to be surreptitious. The reason these transactions occur the way they do is that it's a felony to commit these offenses. It has legal consequences and *if you are going to deal in this particular conduct* you had better not get caught.

7/11/12 RP 179 (emphasis added).

There is no reason for this defendant to be in the parking lot except to get \$120[sic] for a gram of methamphetamine and that is it. ... the only evidence that you have before you is that *this controlled buy went down as it was planned and that the defendant showed up*. There [were] no drugs before and after *the defendant did his part* of it, which took him less than a minute and there is methamphetamine. Counsel wants to say that it was secreted. I don't know that there was some sort of fraud practiced on this defendant. You have no evidence of that. Counsel is going to ask you to make conjecture. *I'm asking you to make a determination based on the facts that are before you and find a drug dealer guilty*.

7/11/12 RP 183–84.

The simple explanation for this particular case, the simple explanation, the one that rings true is that the defendant is guilty. ... *The target is a known drug dealer*. He was there because the informant knew *he was a drug peddler* and he came to the Jack in the Box and *he delivered the stuff just right on like he intended*. ... There is one conclusion. It's the simple and direct conclusion this defendant drove into the parking lot and delivered a gram of methamphetamine for \$120 [sic] and left again. He is guilty

7/11/12 RP 200. Defense counsel did not object to the State's

characterization of Mr. Hudlow as a known drug dealer, despite the fact

there was no evidence of it in the record. A curative instruction would not have been effective, especially where the State had already relied upon impermissible hearsay to establish a relationship between the CI, a phone call, methamphetamine, the Jack in the Box parking lot, and the arrival of Mr. Hudlow. Counsel's deficient performance here only compounded his deficient performance as to the impermissible hearsay. There was no legitimate strategic or tactical explanation for not objecting to this evidence.

c. Deficient performance was prejudicial. Turning to the second Strickland prong, the deficient performance prejudiced Mr. Hudlow. The remaining untainted (and scant) evidence raised a reasonable doubt that the source of the methamphetamine was Mr. Hudlow, rather than the CI or an unknown third party. Therefore, there is a probability that but for counsel's error the result might have been different.

3. The prosecutor's misconduct in closing by commenting on the constitutional right to remain silent and implying the defense has a duty to present evidence was not harmless beyond a reasonable doubt.

The Fifth and the Fourteenth amendments forbid the prosecutor from commenting on an accused's silence. Griffith v. California, 380 U.S. 609, 615, 14

L.Ed.2d 106, 85 S. Ct. 1229 (1965). Both the United States and Washington Constitutions guarantee a criminal defendant the right to be free from self-incrimination, including the right to silence. U.S. Const. amend. V; Wash. Const. art. I, § 9. Washington courts interpret the two provisions similarly, and liberally construe the right against self-incrimination. State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996). The right against self-incrimination prohibits the State from using a defendant's constitutionally protected silence as substantive evidence of guilt. Easter, 130 Wn.2d at 236. The State may not use a defendant's silence to “suggest to the jury that the silence was an admission of guilt.” State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996); State v. Fuller, 169 Wn. App. 282 P.3d 126 (2012).

Likewise it is improper to imply that the defense has a duty to present evidence. State v. McKenzie, 157 Wn.2d 44, 58-59, 134 P.3d 221 (2006); State v. Toth, 152 Wn. App. 610, 217 P.3d 277 (2009) (DUI case in which deputy prosecuting attorney implied defendant should have called witnesses to corroborate his account of “only two beers”.) A prosecutor may commit misconduct if he mentions in closing argument that the defense did not present witnesses or explain the factual basis of the charges or if the prosecutor states that the jury should find the defendant guilty simply because he did not present evidence to support his defense theory. *See* State v. Traweek, 43 Wn. App. 99, 106–07, 715 P.2d 1148

(1986), *overruled on other grounds by* State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991).

Normally, prosecutorial misconduct is grounds for reversal where there is a substantial likelihood the misconduct affected the verdict. State v. Pirtle, 127 Wn.2d 628, 672, 904 P.2d 245 (1995). However, when the prosecutor's misconduct affects a constitutional right, such as the right against self-incrimination, the court undertakes a separate analysis; the constitutional harmless error analysis. *See* Easter, 130 Wn.2d at 242-43. Under this review, the error is harmless only if the reviewing court is convinced beyond a reasonable doubt that the jury would have reached the same result and the untainted evidence is so overwhelming it necessarily leads to a finding of guilt. Easter, 130 Wn.2d at 242. The State bears the burden of showing a constitutional error was harmless. Id.

Here, during closing the State committed misconduct by commenting on Mr. Hudlow's right to remain silent and implying he had a duty to present evidence:

... There is no explanation, lawful explanation and there has been none. Counsel can only argue that there might be some lawful explanation for this. There is no testimony on this record. You are only asked to have conjecture. To sum up some phantom about what that might have been. ...

The court overruled defense counsel's objection. 7/11/12 RP 183-84.

As set forth in preceding issues, the State used impermissible hearsay to establish its case against Mr. Hudlow. The State's conscious choice to present its case without testimony from the CI or the CI's case agent officer denied Mr. Hudlow his right to confront his accusers through cross-examination. The State committed misconduct by then arguing in closing that he had failed to confront his accusers because he did not take the stand or present evidence. The untainted evidence of guilt did not overwhelmingly establish the State's theory. The State's emphasis on Mr. Hudlow's silence and lack of presentation of evidence may well have swayed the jury. This Court cannot be convinced beyond a reasonable doubt that the jury would have reached the same result. The State's misconduct was not harmless.

4. Cumulative error deprived Mr. Hudlow of a fair trial as guaranteed by Wash. Const. art. I, §§ 21 and 22.

Under the cumulative error doctrine, a defendant may be entitled to a new trial when the trial court's cumulative errors were fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994), *clarified*, 123 Wn.2d 737, 870 P.2d 964, *cert. denied*, 513 U.S. 849 (1994). The defendant bears the burden of proving an accumulation of error of sufficient magnitude that retrial is necessary.

Lord, 123 Wn.2d at 332. Reversal is required whenever cumulative errors “deny a defendant a fair trial.” State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426, *rev. denied*, 133 Wn.2d 1019 (1997).

Here, Mr. Hudlow did not receive a fair trial. We have submitted several errors—some of constitutional magnitude and all affecting the outcome of this jury trial—where we have argued that the evidence at the outset is insufficient and there is reasonable doubt that a jury would have reached the same result in the absence of each of these errors. As such, if this Court were to rule that the above errors, on their own, do not mandate reversal, then the errors, taken together, do.

5. The trial court violated the defendant's right to due process under Washington Constitution, article 1, § 3, and United States Constitution, Fourteenth Amendment, when it entered judgment against him for a crime unsupported by substantial evidence.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); In re Winship, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court

explained in Winship: "[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law." In re Winship, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. State v. Moore, 7 Wn. App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. Id. In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. State v. Aten, 130 Wn.2d 640, 927 P.2d 210 (1996).

"Substantial evidence" in the context of a criminal case means evidence sufficient to persuade "an unprejudiced thinking mind of the truth of the fact to which the evidence is directed." State v. Taplin, 9 Wn. App. 545, 513 P.2d 549 (1973) (quoting State v. Collins, 2 Wn. App. 757, 759, 470 P.2d 227, 228 (1970)). This includes the requirement that the state present substantial evidence "that the defendant was the one who perpetrated the crime." State v. Johnson, 12 Wn. App. 40, 527 P.2d 1324 (1974). The test for determining the sufficiency of the evidence is 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." Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

For example, in State v. Mace, 97 Wn.2d 840, 650 P.2d 217 (1982), the defendant was charged and convicted of burglary. At trial, the state presented the following evidence: (1) during the evening in question, someone entered the victims' home in Richland without permission and took a purse, which contained a wallet and a bank access card, (2) that the card was used in a cash machine in Kennewick (an adjoining city), at 4:30 that same morning, (3) that the victim's wallet was found in a bag next to the cash machine, (4) that the bag had the defendant's fingerprints on it, and (5) that the defendant's fingerprints were also found on a piece of paper located by a second cash machine where the card was used.

Following conviction, Mr. Mace appealed, arguing that the state had failed to present substantial evidence to support the burglary conviction. The Court of Appeals disagreed, and affirmed. Mr. Mace then sought and obtained review by the Washington Supreme Court, which reversed, stating as follows.

Second degree burglary is defined as follows:

A person is guilty of burglary in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a building other than a vehicle.

RCW 9A.52.030(1). We agree with petitioner that the State failed to sustain its burden of proof. The State's evidence proved only that petitioner may have possessed the recently stolen bank cards in Kennewick. **There was no direct evidence, only inferences**, that he had committed second degree burglary by entering the premises in Richland.

Mace, 97 Wn.2d at 842–43 (emphasis added).

In the case at bar, the state charged the defendant with delivery of methamphetamine under RCW 69.50.401. This statute provides as follows:

(1) Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.

RCW 69.40.401(1).

The gravamen of this offense, as charged and instructed against Mr. Hudlow, is to deliver methamphetamine to another person. As the following explains, the evidence presented at trial, even when seen in the light most favorable to the state, does not constitute substantial evidence that anyone delivered anything to the police informant on February 25, 2011, much less that Mr. Hudlow delivered methamphetamine to the informant. First and foremost, three facts about this case should be noted:

(1) no witness saw the defendant possess or deliver methamphetamine or

even exchange anything with the police informant; (2) the informant was out of the sight of the variously positioned deputies for significant periods of time and passed through trees, bushes and other obstructions; and (3) the glass in a window of the defendant's car was bashed out.

Under these three critical facts, there were many sources for the methamphetamine the informant gave to the deputy. For example, the methamphetamine could have been placed in the car by anyone who passed by the broken window or could have been left in the car by an unknown passenger. Similarly, since the buy location had been previously arranged, the tiny package could have been stashed and retrieved by the CI in bushy areas between the WINCO and restaurant parking lots as he travelled in and out of sight of officers. Third, since he had prior knowledge of Mr. Hudlow's car, it could have previously been secreted inside the car by the CI in a plan to falsify evidence against the defendant and at the same time garner the approbation of the police.

One may conclude that the methamphetamine did not come from the informant's person, given the detective's testimony concerning his search of the CI. However, the pre-existing broken window, the unknown relationship between Mr. Hudlow and the CI (which at the State's choosing could not be explored at trial), the CI's familiarity with Mr.

Hudlow's car, the absence of police monitoring of the CI prior to the buy, and the officers' failure to keep the CI within their view at all times creates a situation in which the police could only suspect that the defendant was the source of the methamphetamine. As the decision in Mace explains, evidence that only gives rise to suspicion or speculation does not constitute substantial evidence sufficient to meet the requirements of due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment. As a result, this court should reverse the defendant's conviction and remand with instructions to dismiss.

6. The evidence was insufficient to establish that the defendant knew he was delivering methamphetamine, as required under the law of the case.

The Due Process Clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt. U.S. Const. Amend. XIV; In re Winship, 397 U.S. 358 at 364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). This includes elements added under the "law of the case" doctrine. *See* State v. Hickman, 135 Wn.2d 97, 954 P.2d 900 (1998). An instruction to which no objection is made becomes the "law of the case." Hickman, *supra*.

Delivery of a Controlled Substance ordinarily requires proof that

the accused knew that the substance was a controlled substance. State v. Nunez-Martinez, 90 Wn. App. 250, 95 1 P.2d 823 (1998). Here, the State charged Mr. Hudlow with unlawful delivery of a controlled substance-methamphetamine, in violation of RCW 69.50.401(2)(b), alleging that he “knowingly and unlawfully deliver[ed] a controlled substance, to wit: methamphetamine.” CP 15. The trial court’s “to convict” instruction set forth the following element: “That the defendant knew that the substance delivered was a controlled substance methamphetamine.” CP 64. Because the State proposed and did not except to the “to convict” instruction, the instruction became the law of the case. CP 45; 7/11/12 RP 168; Hickman, 135 Wn.2d at 101–02 (jury instructions to which the State failed to object are the law of the case, and assignment of error may include a challenge to the sufficiency of evidence of an element added in the instruction); State v. Ong, 88 Wn. App. 572, 577–78, 945 P.2d 749 (1997) (same). *See also* State v. Barringer, 32 Wn. App. 882, 887–88, 650 P.2d 1129 (1982) (State assumed burden of proving unnecessary element in its proposed instructions), *overruled in part on other grounds by* State v. Monson, 113 Wn.2d 833, 849–50, 784 P.2d 485 (1989). Thus under Instruction No. 10, the State was required to prove that Mr. Hudlow knew the package he delivered contained methamphetamine, and not merely a generic

controlled substance or other contraband or even a legal substance. Ong, 88 Wn. App. at 577.

In Ong, the defendant was accused of giving a morphine tablet to a child. To prove that he knew the tablet was morphine, the state presented evidence consisting of "(1) Ong's five felony convictions; (2) Ong's drug paraphernalia (i.e., syringes, a straw, smoking device, cotton); (3) the small numbers marked on the tablets; (4) his testimony that he knew the pills were "pain medication"; (5) his testimony that he stole the pills; (6) and his flight to Bremerton, showing consciousness of guilt." Ong, 88 Wn. App. at 577-578 (footnote omitted). The Court held that "[N]othing in this evidence points to knowledge that the substance was morphine rather than any other controlled substance," and noted that the Uniform Controlled Substances Act lists nearly 240 substances. Ong, at 578, n. 8.

In this case, the state presented even less evidence. The record contains no direct evidence that Mr. Hudlow knew methamphetamine was a controlled substance. After excision of the tainted hearsay evidence, the State's remaining circumstantial evidence—the CI made a call, Mr. Hudlow showed up, and a package was found which contained methamphetamine—does not support a reasonable inference that Mr. Hudlow and the package of methamphetamine were even connected.

The evidence is insufficient to prove Mr. Hudlow's personal knowledge that the package contained methamphetamine. The conviction must be reversed and the case dismissed with prejudice. Ong, supra.

7. The implied finding that Mr. Hudlow has the current or future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.

Courts may require an indigent defendant to reimburse the state for the costs only if the defendant has the financial ability to do so. Fuller v. Oregon, 417 U.S. 40, 47-48, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); State v. Curry, 118 Wn.2d 911, 915-16, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). To do otherwise would violate equal protection by imposing extra punishment on a defendant due to his or her poverty.

a. Relevant statutory authority. RCW 9.94A.760(1) provides that upon a criminal conviction, a superior court "may order the payment of a legal financial obligation."⁵ RCW 10.01.160(1) authorizes a superior court to "require a defendant to pay costs." These costs "shall be limited to expenses specially incurred by the state in prosecuting the defendant." RCW 10.01.160(2). In addition, "[t]he court shall not order a defendant to pay costs unless the defendant is or will be able to pay them." RCW

⁵ It appears that imposition of legal financial obligations is also contemplated by the Juvenile Justice Act. See RCW 13.40.192.

10.01.160(3). “In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.” RCW 10.01.160(3).

b. There is insufficient evidence to support the trial court's implied finding that Mr. Hudlow has the present and future ability to pay legal financial obligations. Curry concluded that while the ability to pay was a necessary threshold to the imposition of costs, a court need not make a specific finding of ability to pay: “[n]either the statute nor the constitution requires a trial court to enter formal, specific findings regarding a defendant's ability to pay court costs.” 118 Wn.2d at 916. Curry recognized, however, that both RCW 10.01.160 and the federal constitution “direct [a court] to consider ability to pay.” Id. at 915-16.

Here, the court considered Mr. Hudlow’s “past, present and future ability to pay legal financial obligations” but made no express finding that Mr. Hudlow had the present or likely future ability to pay those LFOs.

However, the finding is implied because the court ordered that all payments on the LFOs be paid “commencing immediately” and in the amount of \$50.00 per month *after* it considered “the total amount owing,

the defendant's present and future ability to pay legal financial obligations, including the defendant's financial resources and the likelihood that the defendant's status will change.” CP 74 at ¶ 2.5; CP 76 at ¶ 4.1.

Whether a finding is expressed or implied, it must have support in the record. A trial court's findings of fact must be supported by substantial evidence. State v. Brockob, 159 Wn.2d 311, 343, 150 P.3d 59 (2006) (citing Nordstrom Credit, Inc. v. Dep't of Revenue, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993)). The trial court's determination “as to the defendant's resources and ability to pay is essentially factual and should be reviewed under the clearly erroneous standard.” State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511, 517 fn.13 (2011), citing State v. Baldwin, 63 Wn. App. 303, 312, 818 P.2d 1116, 837 P.2d 646 (1991).

“Although Baldwin does not require formal findings of fact about a defendant's present or future ability to pay LFOs, the record must be sufficient for [the appellate court] to review whether ‘the trial court judge took into account the financial resources of the defendant and the nature of the burden imposed by LFOs under the clearly erroneous standard.’ ” Bertrand, 165 Wn. App. 393, 267 P.3d at 517, citing Baldwin, 63 Wn. App. at 312 (bracketed material added) (internal citation omitted). A

finding that is unsupported in the record must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

Here, the record does not show that the trial court took into account Mr. Hudlow's financial resources and the nature of the burden of imposing LFOs on him. The record contains no evidence to support the trial court's implied finding in ¶¶ 2.5 and 4.1 that Mr. Hudlow has the present or future ability to pay LFOs. The record instead supports the opposite conclusion: the trial court found Mr. Hudlow indigent for purposes of pursuing this appeal (SCOMIS sub-no. 095). The implied finding that Mr. Hudlow has the present or future ability to pay LFOs that is implicit in the directive to make payments commencing immediately and at a rate of up to \$50.00 per month is simply not supported in the record. It is clearly erroneous and the directive must be stricken from the Judgment and Sentence. Bertrand, 165 Wn. App. 393, 267 P.3d at 517.

c. The remedy is to strike the unsupported finding. Bertrand is clear: where there is no evidence to support the trial court's finding regarding ability and means to pay, the finding must be stricken. Bertrand, 165 Wn. App. 393, 267 P.3d at 517. Similarly, any implied findings of the present or future ability to pay LFOS of any nature must be stricken where

the court made no inquiry and there is no evidence in the record to support such findings.

This remedy is supported by case law. Findings of fact that are unsupported by substantial evidence, or findings that are insufficient to support imposition of a sentence are stricken and the underlying conclusion or sentence is reversed. State v. Lohr, 164 Wn. App. 414, 263 P.3d 1287, 1289-92 (2011); State v. Schelin, 147 Wn.2d 562, 584, 55 P.3d 632 (2002) (Sanders, J. dissenting). There appears to be no controlling contrary authority holding that it is appropriate to send a factual finding without support in the record back to a trial court for purposes of “fixing” it with the taking of new evidence. *Cf.* State v. Souza (vacation and remand to permit entry of further findings was proper where evidence was sufficient to permit finding that was omitted, the State was not relieved of the burden of proving each element of charged offense beyond reasonable doubt, and insufficiency of findings could be cured without introduction of new evidence), 60 Wn. App. 534, 541, 805 P.2d 237, *recon. denied, rev. denied*, 116 Wn.2d 1026 (1991); Lohr (where evidence is insufficient to support suppression findings, the State does not have a second opportunity to meet its burden of proof), 164 Wn. App. 414, 263 P.3d at 1289–92.

Mr. Hudlow is not challenging *imposition* of the LFOs; rather, the trial court made the implied finding that he has the present and future ability to pay them and, and since there is no evidence in the record to support the finding, the finding must be stricken as clearly erroneous. The reversal of the trial court's implied finding of present and future ability to pay LFOs simply forecloses the ability of the Department of Corrections to begin collecting LFOs from Mr. Hudlow until after a future determination of his ability to pay. It is at a future time when the government seeks to collect the obligation that “ [t]he defendant may petition the court at any time for remission or modification of the payments on [the basis of manifest hardship]. Through this procedure the defendant is entitled to *judicial scrutiny* of his obligation and *his present ability to pay at the relevant time.*’ ” Bertrand, 165 Wn. App. at 405, citing Baldwin, 63 Wn. App. at 310–11, 818 P.2d 1116, 837 P.2d 646 (citing court adding emphasis and omitting footnote).

8. The sentencing court did not have statutory authority to impose a variable term of community custody contingent on the amount of earned early release under RCW 9.94A.701, the statute authorizing the superior court to impose a sentence of community custody.

Sentencing is a legislative power, not a judicial power. State v. Bryan, 93 Wn.2d 177, 181, 606 P.2d 1228 (1980). The legislature has the power to fix punishment for crimes subject only to the constitutional limitations against excessive fines and cruel punishment. State v. Mulcare, 189 Wn. 625, 628, 66 P.2d 360 (1937). It is the function of the legislature and not the judiciary to alter the sentencing process. State v. Monday, 85 Wn.2d 906, 909-910, 540 P.2d 416 (1975). A trial court's discretion to impose sentence is limited to what is granted by the legislature, and the court has no inherent power to develop a procedure for imposing a sentence unauthorized by the legislature. State v. Ammons, 105 Wn.2d 175, 713 P.2d 719, 718 P.2d 796 (1986).

Statutory construction is a question of law and reviewed de novo. Cockle v. Dep't of Labor & Indus., 142 Wn.2d 801, 807, 16 P.3d 583 (2001). A trial court may only impose a sentence that is authorized by statute. In re Pers. Restraint of Carle, 93 Wn.2d 31, 604 P.2d 1293 (1980).

RCW 9.94A.701(3) provides that:

A court shall, in addition to the other terms of the sentence, sentence an offender to community custody for one year when the court sentences the person to the custody of the department for: ...

(c) A felony offense under chapter 69.50 or 69.52 RCW, committed on or after July 1, 2000.

RCW 9.94A.701(3)(c). Delivery of a controlled substance—

methamphetamine is a Class B felony under RCW 69.50.401(1), (2)(b)

and the transaction in this case took place February 25, 2011. Thus, the court could impose a 12-month term of community custody.

However, “[u]nder [RCW 9.94A.701], a court may no longer sentence an offender to a variable term of community custody contingent on the amount of earned release but instead, it must determine the precise length of community custody at the time of sentencing.” State v. Franklin, 172 Wn.2d 831, 836, 263 P.3d 585 (2011).

Here, the trial court imposed the following term of community custody:

(A) The defendant shall be on community placement or community custody for the longer of:

(1) the period of early release. RCW 9.94A.728(1), (2); or

(2) the period imposed by the court, as follows:

... 12 months;

CP 77 at ¶ 4.5.

The trial court did not have the statutory authority to sentence Mr. Hudlow to a variable term of community custody contingent on the amount of earned release. Under RCW 9.94A.701 it could only sentence him to a finite term of 12 months. Therefore, the variable term of community custody imposed by the trial court was improper.

D. CONCLUSION

For the reasons stated, the conviction should be reversed and dismissed. Alternatively, it should be remanded for a new trial or for resentencing with instructions to impose a finite term of 12 months community custody and to strike the implied finding of present and future ability to pay legal financial obligations from the Judgment and Sentence.

Respectfully submitted on April 15, 2013.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on April 15, 2013, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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