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Court of Appeals
Division III
State of Washington

NO. 310272-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

THOMAS ROBERT HUDLOW, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00414-1

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

Investigation and facts presented at trial:

A confidential informant¹ working with the Tri City Metro Drug Task Force, and the defendant had previously agreed to meet at a Jack in the Box parking lot in Kennewick, Washington on February 25, 2011, at around 2:30 p.m. for a methamphetamine transaction. (RP² 15-16).

To control as many factors as possible, Detectives Carlson and Duty picked up the CI from a pre-designated location. Carlson strip searched the CI to make sure there were no drugs on his or her person. (RP 10, 16). The CI was then given “buy money” to use in the controlled buy with Mr. Hudlow. (RP 63). Once in the car with Detectives Carlson and Duty, the CI telephoned the defendant. (RP 15). With Detective Carlson listening in, the defendant said he was on his way to the location. (RP 15-16, 65).

Detective Duty arrived at the Winco parking lot, which is connected to the Jack in the Box parking lot around 2:49 p.m., with the CI. (RP 65). Detective Carlson observed the CI exit the car and walk approximately 300-500 yards to the Jack in the Box parking lot where Detective Carlson lost sight of him. (RP 67).

¹ Confidential Informant hereinafter “CI.”

Seconds later, Detective Christopher Lee and Sgt. Kirk Isakson saw the CI. (RP 114, 122-23). Isakson saw the CI walking across the Jack in the Box parking lot, and stop on an island in the eastern portion of the parking lot. (RP 92).

The CI remained on the island about nine minutes, until about 2:58 p.m., when the defendant pulled into the Jack in the Box parking lot. (RP 92, 94).

Detective Isakson, who previously knew the defendant, observed him pull into the Jack in the Box parking lot. (RP 90, 94-95). Detective Isakson observed that the defendant's white car had a broken back-left rear window and a spare tire. (RP 94). Detective Lee was also able to positively identify the defendant as the driver of the vehicle, based upon the photograph he was shown earlier during briefing. (RP 111, 114- 15).

Both Detectives Isakson and Lee saw the CI leave the island and get into the vehicle with the defendant. (RP 94-95, 115-16).

Detective Isakson said that he observed "the CI and Mr. Hudlow look[ing] like they were engaged in a little bit of conversation." (RP 95). Detective Isakson could also see the defendant and the CI "kind of looking down" and "could see the shoulder and hand kind of like moving back and

² Unless dated, "RP" refers to the Verbatim Report of Proceeding for the Jury Trial of July 10-11, 2012, submitted by Court Reporter John McLaughlin.

forth.” (RP 95). All that happened over a matter of seconds, and then the CI ended up shaking hands and getting out of the vehicle, and Mr. Hudlow left.” (RP 95). Detective Isakson believed that what he witnessed was a drug transaction. (RP 103). Within a minute to a minute and a half of contact, the two shook hands and the CI got out and walked back towards the Winco parking lot. (RP 96).

After the interaction between the CI and the defendant, the CI got out of the car and Detective Isakson watched him walk back towards the Winco parking lot. (RP 104). Detective Lee also watched the CI and the defendant depart from one another. (RP 116-17).

The CI was away from the undercover car for approximately 17 minutes, and returned at 3:06 p.m. with a baggie later found to contain methamphetamine. (RP 18-20). The CI was searched and no buy funds were ever recovered. (RP 16-17; 71).

The defendant was found guilty of Delivery of a Controlled Substance. (CP 72).

Sentencing Issues:

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

Furthermore, 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 court, as follows:

Count ONE FOR 12 MONTHS.

(CP 77).

The court also ordered a total amount of Legal Financial Obligations (LFOs) of \$2,930.00. (CP 75, 82). The trial court did take into account the resources of the defendant. (CP 74-75 at 2.5). It was stated during sentencing that Mr. Hudlow was employed, and that he had the ability to get to his employment. (RP 7/25/12, 4). Specifically, defense counsel illuminated that the defendant's family planned to be very supportive in helping Mr. Hudlow to be a productive member of society. (RP 7/25/12, 4). Based upon this information, the court ordered Mr. Hudlow to begin making monthly payments on the LFOs commencing immediately, and that he pay up to \$50.00 per month to be taken from any income earned while in DOC custody. (CP 76).

This appeal followed. (CP 84).

II. ARGUMENT

1. STATE'S RESPONSE TO ARGUMENT I.

“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.” (App. Brief, 17).

A. THE DEFENDANT FAILED TO OBJECT TO THE TESTIMONY.

The defendant cannot both argue that his defense attorney was ineffective because he failed to object to hearsay and that the trial court erred because it failed to sustain an objection. As the defendant states in his brief on page 26, “counsel inexplicably failed to object to continued hearsay as the exchange continued.” In any event, the trial court cannot be faulted for failing to rule on an objection which was never made.

B. IN ANY EVENT, THE KEY INFORMATION FROM THE CI - DEFENDANT PHONE CALL WAS NOT OBJECTIONABLE, BECAUSE IT WAS OVERHEARD BY DETECTIVE CARLSON.

Detective Carlson listened in on the phone call placed by the CI shortly before the delivery to the defendant to confirm he was on his way. Obviously, Detective Carlson could testify that he heard the conversation between the defendant and the CI under the “admission by party-opponent” exception. ER 801(d)(2).

The defendant argues that other matters, including the location of the drug deal, the type of controlled substance, and the time when the delivery would occur, could have been subject to an objection. However, these facts are not important. It does not matter what time of day the drug deal would take place or what parking lot the defendant chose to deal the drugs. What is important is that the defendant confirmed that he was coming to meet the CI for the drug deal, a fact directly heard by Detective Carlson.

C. IN ADDITION, IN ANY CASE, THE ADMISSION OF THIS TESTIMONY HAD NO IMPACT ON THE DEFENDANT'S CONVICTION. ANY ERROR WAS HARMLESS.

The defendant's reliance on *State v. Martinez*, 105 Wn. App. 775, 20 P.3d 1062 (2001), is misplaced. In that case, the informant telephoned his drug supplier and asked for a delivery. Law enforcement officers were present and listened to the defendant's end of the conversation, but did not listen in on both sides of the telephone call. The defendant was arrested when he parked in front of the informant's residence on the strength of the informant's statement that the vehicle was his supplier's. The defendant in *Martinez* was charged with Possession of a Controlled Substance with Intent to Deliver.

In this case, there was an actual drug delivery by the defendant to

the CI. The police strip searched the CI, gave him money to buy drugs, observed him get into the defendant's vehicle, and observed an apparent hand-off of drugs while the CI was in the defendant's vehicle. (RP 10, 16, 63, 94-96, 115-16) The CI then returned to his police handlers, who found that he no longer had the money, but did have methamphetamine. (RP 18-20, 71).

As stated in *Martinez*, harmless ness must be determined on the basis of the evidence remaining if objectionable information is not considered. *Id.* at 785. Here, it does not matter that the CI and defendant previously arranged for a delivery of methamphetamine at a Jack in the Box parking lot on February 25, 2011, at 2:30 p.m.; what matters is that the defendant did meet with the CI in full view of police officers. Before the meeting, the CI did not have any drugs. (RP 16-17). After the meeting, he did. (RP 19). Before the meeting, the CI had cash. (RP 63). After the meeting, he did not. (RP 71). The defendant was the only person who could have delivered the drugs to the CI.

2. STATE’S RESPONSE TO ARGUMENT II.

“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. (App. Brief, 25).

Standard On Review:

In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate (1) deficient performance, that his attorney's representation fell below the standard of reasonableness, and (2) resulted in prejudice so serious that the defendant was deprived of a fair trial *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). If a defendant fails to establish either prong, we need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To establish deficient performance, a defendant has the heavy burden of showing that his attorney made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment. There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335–36, 899 P.2d 1251 (1995).

A. REGARDING THE CLAIM OF INEFFECTIVE ASSISTANCE DUE TO FAILURE TO OBJECT TO HEARSAY, THE DEFENDANT HAS NOT ESTABLISHED EITHER PRONG.

1. *The performance of counsel was not deficient, but a trial tactic to discredit Detective Carlson.*

The defense attorney's decision not to object to testimony by Detective Carlson appears to be a tactic to try to discredit him. Carlson testified on direct examination that he had listened in on the phone call between the CI and dealer. (RP 15). He gave a clear impression in that call that arrangements were made to purchase methamphetamine at a Jack in the Box parking lot, in Kennewick, Washington on February 25, 2011 at 2:30 p.m. (RP 15-16).

However, the defense attorney tried to discredit Detective Carlson by pointing out that he did not actually overhear this conversation. (RP 65). In a case where the evidence of a drug deal came totally from police officers, this was a legitimate tactic.

2. *Additionally, the hearsay did not cause the defendant's conviction.*

As stated above, the defendant was convicted because he is the only possible person who could have delivered the drugs to the CI. To recap, the police strip searched the CI, gave him money, watched as he got

into the defendant's car, saw a transaction between the defendant and CI while in the car, regained control of the CI and found that he then had no money, but did have methamphetamine. Those are the key facts. The information Detective Carlson related about where and what time of day the drug deal would occur was not important.

B. ALSO, REGARDING THE CLAIM OF INEFFECTIVE ASSISTANCE DUE TO FAILURE TO OBJECT TO THE PROSECUTOR'S CLOSING ARGUMENT, THE DEFENDANT HAS NOT ESTABLISHED EITHER PRONG.

1. *The defense attorney's performance was not deficient.*

a. "Known drug dealer."

There is only one such comment which the defendant cites, at RP 184. (App. Brief, 29). However, the deputy prosecutor clarified that the defendant was "known" to be a drug dealer to the CI:

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 just like he intended.

(RP 200).

The State did not argue that the defendant was a person who the police knew was a drug dealer. However, it is a reasonable assumption

that the CI was able to buy drugs from the defendant because he or she had done so before.

Further, the State's entire closing argument should be reviewed in context. Nowhere did the deputy prosecutor argue that the jury should find the defendant guilty because he is a known drug dealer or because the police have been attempting to target him for an extended period. Rather, the deputy prosecutor properly set forth the evidence against the defendant and asked the jury to find him guilty.

The prosecutor's comments indicating the defendant's behavior was that of a drug dealer or actually was a drug dealer were not far off base, thus not requiring an objection. In *State v. Hoffman*, 116 Wn.2d 51, 94-5, 804 P.2d 577 (1991), the court held that a prosecutor is permitted reasonable latitude in drawing inferences from the evidence presented at trial.

b. Other remarks:

The other remarks cited by the defendant on appeal, even standing alone, do not warrant an objection. The deputy prosecutor appropriately stated that:

- “The controlled buy went down as planned,” (RP 184).
- “I’m asking you to make a determination based on the facts that are before you and find a drug dealer guilty,” (RP 184).

- “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.” (RP 179).

The remarks did not necessitate an objection because the prosecutor properly made an inference from the evidence. The defendant has not explained why any of these comments are objectionable as not being supported by the evidence.

2. *Performance did not have an adverse affect on the verdict.*

Prejudice can be shown if there is a probability that counsel’s errors affected the result. *State v. Glenn*, 86 Wn. App. 40, 44, 935 P.2d 679 (1997).

Here, the defendant's conviction was based on overwhelming evidence. Only the defendant could have delivered the drugs to the CI. He was the one person who met with the CI, who appeared to hand the CI something, who the CI could have given the "buy money" to, and who could have given the CI the methamphetamine.

3. STATE’S RESPONSE TO ARGUMENT 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.” (App. brief, 30).

The State respectfully suggests the issue is whether the trial court properly denied the defendant’s objection to a portion of the closing argument. Since the trial court did not find that the deputy prosecutor’s closing argument was in error, the issue should be whether that decision is incorrect, not whether there was prosecutorial misconduct. In any event, the State will address both issues.

A. STANDARD OF REVIEW REGARDING PROSECUTORIAL MISCONDUCT

A defendant claiming prosecutorial misconduct on appeal must demonstrate that the prosecutor’s conduct at trial was both improper and prejudicial. *State v. Fisher*, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). Concerning the prejudice prong, if the defendant objected to the prosecutor’s conduct, the issue is whether the conduct resulted in a substantial likelihood that the verdict was affected. *State v. Sakellis*, 164 Wn. App. 170, 184, 269 P.3d 1029 (2011).

1. ***There was no misconduct in the closing argument.***

The alleged improper statements should be viewed in the context of the prosecutor's entire argument, the issues in the case, the evidence discussed in the argument, and the jury instructions. *State v. Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003).

Here, the defendant has pointed to the prosecutor's statement and argues that it commented "on Mr. Hudlow's right to remain silent and impl[ied] he had a duty to present evidence." (App. Brief, 32). The prosecutor made no such comment or argument. The statement quoted by the defendant on page 32 of his brief does not refer to the defendant not testifying, or a duty to present evidence. Rather, these comments pointed the jury's attention to the evidence presented during trial and on this specific record.

At no time did the prosecutor refer to the defendant's failure to testify or failure to present evidence. The defendant cites *State v. Easter*, where the defendant was characterized as a "smart drunk" and testimony was provided as to how the defendant's silence was "evasive and evidence of his guilt." *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996). In contrast, the prosecutor in the present case did not directly refer to the

defendant's right to remain silent, nor does he call for the defendant to elicit evidence.

Unlike in *State v. Easter*, the prosecutor did not directly refer to the defendant and his ability to exercise this right and then repeat the statement throughout his closing. The prosecutor only commented that there was not an explanation. According to the 9th circuit, "no explanation" statements are injudicious, however they do not violate the constitution. *U.S. v. Hill*, 953 F.2d 452, 460 (1991). Therefore, the prosecutor's statement was not improper when he used a "no explanation" statement during his closing argument.

2. *In addition, the defendant has not shown any prejudice he suffered by the closing argument.*

Prejudice can only be established where there is a "substantial likelihood that the misconduct affected the jury's verdict." *State v. Carver*, 122 Wn. App. 300, 306, 93 P.3d 947 (2004). The defendant has failed to establish the likelihood that those comments affected the jury's verdict, established any prejudice, or that they could not have been cured.

Considering the evidence presented, the entirety of the prosecutor's closing remarks, and all of the jury instructions given, the jury was not *required* to believe the defendant should have testified. Nor,

should the jury have taken into consideration the fact the defendant chose not to testify. Specifically, the burden of proof instruction directs the jury that the State has the burden of proving, beyond a reasonable doubt, that all the elements of the charged crime have been met. This instruction enforces that the defendant does not have to present any evidence that a reasonable doubt exists.

In addition, the Judge did not find it necessary to instruct the jury specifically that they should not consider the defendant's silence. Any resulting prejudice could have been cured by a jury instruction. *State v. Warren*, 165 Wn.2d 17, 42, 195 P.3d 940 (2008), *citing State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). Here, the defendant did not request a cautionary instruction that could have cured any prejudice. Thus, even if improper, the record is void of any prejudice suffered by the defendant, and therefore is harmless.

The evidence is overwhelming. The drugs did not fall from the sky into the CI's hand. The money in the CI's possession was not beamed up to a space ship. The closing arguments did not change the evidence.

B. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN NOT SUSTAINING THE DEFENDANT'S OBJECTION.

Attorneys are allowed wide latitude in closing argument, and the trial court has broad discretion when ruling on objections during closing

argument and when determining whether a particular statement is prejudicial to the defendant. *State v. Francis*, 60 S.W.3d 662, 671 (2001). A trial court's ruling should not be disturbed unless it amounted to an abuse of discretion that prejudiced the defendant. *Id.* A prosecutor's statements during closing argument "must be plainly unwarranted and clearly injurious to the accused" to constitute an abuse of discretion. *Id.* Under this standard, even irrelevant or otherwise improper remarks by a prosecutor during closing argument will not necessarily require reversal of a conviction. *State v. Ozier*, 961 S.W.2d 95, 98 (1998).

The deputy prosecutor's argument was appropriate. It did not suggest that the jury should find the defendant guilty because he did not testify.

4. STATE'S RESPONSE TO ARGUMENT IV.

"Cumulative error deprived Mr. Hudlow of a fair trial as guaranteed by Wash. Const. art. I, § 21 and 22." (App. Brief, 33).

A. MR. HUDLOW'S TRIAL WAS NOT FILLED WITH ERROR WARRANTING REVERSAL UNDER THE DOCTRINE OF CUMULATIVE ERROR.

A defendant may be entitled to a new trial, under the cumulative error doctrine if the trial court's cumulative errors were fundamentally unfair. *Matter of 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). However, a new trial should not be granted if it did not amount to cumulative error that was unfair. *Brown v. U.S.*, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973). “[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials.” *Id.* If the defendant can show that he was given an unfair trial due to the cumulative errors, a reversal would be required. *State v. Perrett*, 86 Wn. App. 312, 322, 936 P.2d 426 (1997), *rev. denied*, 133 Wn.2d 1019 (1997).

In the instant case, Mr. Hudlow received a fair trial. For the reasons the State has previously submitted within this brief, the defendant has failed to establish that his trial was so filled with error as to warrant a reversal.

5. STATE’S RESPONSE TO ARGUMENT V.

“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.” (App. brief, 35).

A. THE DEFENDANT’S RIGHT OF DUE PROCESS OF LAW WAS NOT VIOLATED BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO SUPPORT THE CRIME FOR WHICH HE WAS CONVICTED.

To establish support for the crime convicted, the trier of fact must meet a narrow standard. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979). This narrow standard asks 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.” *Id.* Furthermore, the evidence presented needs to meet the substantial evidence standard under the facts. “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 (1970)).

B. THE STATE PROVIDED SUBSTANTIAL EVIDENCE TO SUPPORT THE CRIME OF WHICH MR. HUDLOW WAS CONVICTED.

- 1. There is substantial evidence to show the defendant provided the methamphetamine to the CI, because the CI was always in the sight of the variously positioned deputies.*

Mr. Hudlow contends that the State did not meet the substantial evidence burden to show Tri-City Metro always had an eye on the CI. However, a rational trier of fact could logically tie the evidence produced

in trial to establish that the CI was never out of the sight of the Tri-City Metro Drug Task Force. During the questioning of Deputy Carlson, it was established that the deputy had a visual of the CI until he entered the Jack in the Box parking lot. (RP 66-68). It was during this time that Detective Christopher Lee obtained a visual of the CI:

Q: [Defense Counsel] When did you first see the informant?

A: [Det. Lee] At the very further west end as the cars are parked in the stalls that is where I first saw the informant all the way over to the Jack in the Box parking lot.

Q: [Defense Counsel] Were you ever watching him cross the street or was he already in the Jack in the Box parking lot when you saw him?

A: [Det. Lee] *As far as crossing the street are you referring to the entrance that goes into the WINCO parking lot.*

Q: [Defense Counsel] *And you are able to see him at that point?*

A: [Det. Lee] *Yes.*

(Emphasis added) (RP 113-14).

The defendant argues that once the CI entered the Jack in the Box parking lot he was no longer visible. However, because the line of sight on the CI was never broken between the time the CI left Detective Carlson's vision and the time Detective Lee watched him cross the street and enter the Jack in the Box parking lot, the question of where the methamphetamine came from becomes a moot issue. Furthermore, this

decreases the likelihood that anyone was the source of the methamphetamine but Mr. Hudlow.

2. *When taken in the light most favorable to the prosecution, the bashed-out car window is insufficient to show anyone else delivered the methamphetamine.*

Mr. Hudlow's argument about the source of the methamphetamine possibly being due to the back window of his car being bashed out creates a slippery slope argument. Here, allowing a defendant convicted of delivering methamphetamine to appeal based on a broken window in his car, would vest an opportunity for all drug dealers to use this tactic. Drug dealers would be encouraged to go around with broken windows in case they were being set up by the police. A weak argument such as this should not be allowed, as it would undermine the legislature and impede judicial economy.

6. STATE'S RESPONSE TO ARGUMENT VI.

The evidence was insufficient to establish that the defendant knew he was delivering methamphetamine, as required under the law of the case." (App. brief, 39).

A. THE TRIER OF FACT MUST MEET A NARROW STANDARD TO ESTABLISH SUPPORT FOR THE CRIME THE DEFENDANT IS CHARGED WITH.

The standard of review for the sufficiency of evidence to support a

criminal conviction is well settled. The Appellate Court must review the evidence in a light most favorable to the State and then determine whether “ ‘any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ ” *State v. Randhawa*. 133 Wn.2d 67, 73, 941 P.2d 661 (1997) (quoting *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1960)). Circumstantial evidence and direct evidence are equally reliable. *State v. McNeal*, 98 Wn. App. 585, 592, 991 P.2d 649 (1999); *State v. Delmarter*. 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Specific criminal intent may be inferred from circumstances as a matter of logical probability. *State v. Stearns*, 61 Wn. App. 224, 228, 810 P.2d 41 (1991), *Review denied* 117 Wn.2d 1012 (1991).

In the current case, the circumstantial evidence outweighs any question of whether or not Mr. Hudlow knew he was delivering methamphetamine. The meeting between the CI and Mr. Hudlow was very brief, lasting only a minute to a minute and half. (RP 96). Furthermore, this short meeting occurred in Mr. Hudlow’s car, suggesting there was a need for a stealth or secretive location. Detective Isakson testified to movement between Mr. Hudlow and the CI, which included shoulder and hand movement as well as some kind of handshake. (RP 95). The exchange of a drug usually includes a passage of a small item for something of monetary value. Here the item was described as being small,

about the size of a flattened golf ball. (RP 69). Additionally, the CI was sent into the meeting with \$110.00 of “buy money,” and came back with methamphetamine and no buy money. (RP 9, 63, 19, 20, 71). Through circumstantial evidence, it is logical to see Mr. Hudlow knew he had methamphetamine due to his behavior, the location and duration of the meeting, the CI’s acquisition of methamphetamine, and the CI’s loss of buy funds.

7. STATE’S RESPONSE TO ARGUMENT VII.

“The implied finding that Mr. Hudlow has the current of future ability to pay Legal Financial Obligations is not supported in the record and must be stricken from the Judgment and Sentence.” (App. brief, 42).

A. THE COURT NEED NOT REVIEW THIS MATTER SINCE IT WAS NOT RAISED AT THE TRIAL COURT.

See RAP 2.5.

B. THE RECORD CONTAINS SUFFICIENT FINDING OF FACT THAT MR. HUDLOW HAS THE ABILITY TO PAY HIS LEGAL FINANCIAL OBLIGATIONS.

It is not mandatory for a defendant to reimburse the State for costs; however, if a defendant has the financial ability to pay the State back, then they should. *State v. Curry*, 118 Wn.2d 911, 915, 829 P.2d 166 (1992); RCW 10.01.160(3); RCW 9.94A.760(2). Although formal findings of fact

about a defendant's present or future ability to pay LFOs are not required, the record must be sufficient to establish that “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. *State v. Baldwin*, 63 Wn. App. 303, 312, 818 P.2d 1116 (1991).

Here the court made express findings that Mr. Hudlow had the ability to pay his LFOs. In the record, it was indicated that Mr. Hudlow was gainfully employed. (RP 4). The record further established that Mr. Hudlow had the ability to drive, as he was reported doing so, meaning that he would have no problem getting to his place of employment. (RP 94, 95, 114, 115, 126, 130). The record established Mr. Hudlow would have the future ability to pay his LFOs.

8. STATE’S RESPONSE TO ARGUMENT VIII.

“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.” (App. brief, 48).

Although the defendant did not object to the community custody provision in the trial court, and although the State used the form provided by the Washington State Court Forms, the State will agree to strike the provision that community custody could be based on the period of early release.

Therefore, the State will propose that the Judgment and Sentence be amended as follows:

4.5 [X] COMMUNITY PLACEMENT or COMMUNITY CUSTODY (To determine which offenses are eligible for or required for community placement or community custody see RCW 9.94A.700, .705, and .715).

(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:

Count ONE FOR 12 MONTHS.

III. CONCLUSION

For the above reasons, this Court should affirm Mr. Hudlow's conviction, but remand to the trial court for entry of an Amended Judgment and Sentence at section 4.5, to strike the provision that community custody could be based on the period of early release.

RESPECTFULLY SUBMITTED this 16th day of July 2013.

ANDY MILLER

Prosecutor



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

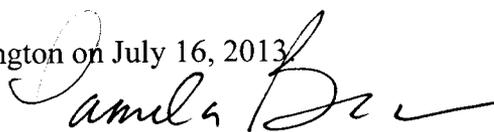
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U.S. Regular Mail, Postage
Prepaid

Signed at Kennewick, Washington on July 16, 2013



Pamela Bradshaw
Legal Assistant