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Court of Appeals
Division III
State of Washington

No. 31501-1-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ARTURO LUNA HUERTA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR YAKIMA COUNTY

The Honorable Blaine G. Gibson

APPELLANT'S OPENING BRIEF

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A. SUMMARY OF ARGUMENT

Arturo Huerta was convicted by a jury of one count of possession with intent to distribute methamphetamine and one count of involving a minor in a controlled substance transaction. Both convictions stem from events that occurred on May 31, 2012, in which Mr. Huerta was accused of constructively possessing methamphetamine found in a vehicle he was driving, and also was accused of involving a minor in a controlled substance transaction that allegedly occurred before that at a different location. Mr. Huerta was not charged with that transaction.

These convictions should be reversed due to the court's failure to keep an open and public trial and due to the insufficiency of the evidence. In the alternative, and at a minimum, trial errors – either individually or cumulatively – require reversal.

As to public access: In the midst of a pretrial battle regarding the State's obligation to provide information about an informant (whose identity was never disclosed even though he was the only witness to the alleged transaction), the trial court listened in chambers to a recording of an interview of the informant without conducting an analysis of whether this *in camera* review violated constitutional rights to open and public proceedings.

Moreover, the jury trial was had after 4 p.m., when the court house typically is presented to the public as closed, thus resulting in a lack of reasonable access to trial proceedings in violation of constitutional rights.

Both these circumstances demonstrate structural error to the public proceedings, requiring reversal of Mr. Huerta's convictions.

As to insufficiency of the evidence: This reversal due to structural error should not include a remand to the trial court for a new trial because the evidence was insufficient to sustain either count and thus the case should be remanded with instructions to dismiss.

There was no evidence that Mr. Huerta took any step to involve the minor in a transaction that allegedly took place almost a football field away from where she stood, and the lack of such evidence results in a vacation of the conviction. In addition, the evidence was insufficient to sustain a conviction for possession with intent to distribute as the amount alleged to be constructively “possessed” in the car that Mr. Huerta was driving was of such a small quantity that it should not result in a conviction.

In the alternative, the various trial errors require reversal, and any remand to the trial court for retrial should include guidance for the parties and the trial court with regard to the resolution of these issues so that the same errors do not repeat.

B. ASSIGNMENTS OF ERROR

1. The court erred when it reviewed evidence *in camera* without conducting a *Bone-Club* analysis, in violation of constitutional principles requiring an open and public trial.

2. The trial court compounded this error by failing to take reasonable measures to provide an open and public trial when it held trial after 4 p.m., when the courthouse otherwise appears closed to the public.

3. The court erred in convicting Mr. Huerta of involving a minor in a controlled substance transaction when there was no evidence that Mr. Huerta took action to involve the minor in the alleged transaction.

4. The court erred in convicting Mr. Huerta of possession of a controlled substance with intent to distribute it when the allegation was for constructive possession in a vehicle that did not belong to Mr. Huerta and when the amount involved only about five grams.

5. The trial court erred in failing to grant Mr. Huerta's motion to dismiss both counts for insufficient evidence.

6. The prosecutor impermissibly amended both charges during closing argument by (a) asserting that Mr. Huerta could be found guilty for possession with intent to distribute based upon an earlier alleged transaction even though Mr. Huerta was not charged with that activity directly, and (b) asserting that the jury could find Mr. Huerta guilty of involving a minor in a drug transaction based on drugs found in the car, after the alleged transaction itself had already taken place.

7. The court erred by accepting the jury's verdict on insufficient evidence and then permitting the State to forego jury interrogatories.

8. The court erred by allowing witnesses to testify regarding the comparison of buy money to a photograph alleged to be of that buy money when neither the money nor the photograph were preserved for trial and its admission violated the best evidence rule and hearsay.

9. The prosecution committed misconduct when it, *inter alia*, commented on Mr. Huerta's silence, presented impermissible hearsay, constructively amended the charges impermissibly, and elicited testimony intending to inflame the jury after having represented that it would not be asking those specific questions.

10. The trial court erred when it overruled objections to lines of questioning intended to inflame the passions of the jury.

11. Cumulative error requires reversal.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1. Whether the court violated constitutional requirements that a trial be open and public when it (a) listened to an untranscribed recording in chambers without conducting a *Bone-Club* analysis, and (b) failed to ensure reasonable access to the trial by holding proceedings even when the signage in the courthouse reads that the courthouse is closed.

Issue Two. Whether the evidence was insufficient to establish the crime of involving a minor in a controlled substance transaction.

- a. There was no evidence that Mr. Huerta took any action to involve the minor at the time of the transaction.
- b. The only evidence in that regard was that Mr. Huerta did *not* take any action to involve the minor at the time of the transaction.
- c. After trial, the trial court held that there was no evidence that the minor knew of the transaction, in effect granting a motion for acquittal on the theory that she acted as a lookout at the time of the transaction.
- d. The government's argument that the transaction continued until Mr. Huerta was arrested blocks away from where the alleged transaction took place (where the minor was allegedly found with "buy" money) is legally incorrect and cannot sustain the conviction.

Issue Three. Whether the prosecutor's decision to forego jury interrogatories means that the conviction of involving a minor in a controlled substance transaction must fail regardless of whether the evidence was sufficient with regard to either theory.

Issue Four. Whether the evidence was insufficient to establish the crime of possession with intent to deliver a controlled substance when the only evidence admissible as to this count was that Mr. Huerta was driving a vehicle that did not belong to him, and the vehicle had a small amount of methamphetamine in it hidden in a bag.

Issue Five. Whether the prosecutor impermissibly amended the charges when it argued in closing that (a) Mr. Huerta could be found guilty for possession with intent to distribute based upon the earlier alleged transaction even though Mr. Huerta was not charged with activity for that count, and (b) Mr. Huerta could be guilty of involving a minor in a drug transaction based on the drugs found in the car.

Issue Six. Whether the court violated hearsay and best evidence rules by allowing testimony about comparing buy money with a photograph of money when neither the money nor the photograph were available.

Issue Seven. Whether the State, through its agents, improperly commented on Mr. Huerta's post-arrest silence; presented impermissible hearsay regarding what the non-testifying informant said or did not say; improperly elicited testimony regarding an unproven affair between Mr. Huerta and the minor, especially egregious because the prosecutor had stated that he would not make that kind of inquiry; and impermissibly constructively amended the charges, misapplying both facts and law.

Issue Eight. Whether the trial court erred by allowing testimony that was designed to inflame the jury rather than elicit relevant testimony.

Issue Nine. Whether the cumulative error of all matters outlined above results in reversible error.

D. STATEMENT OF THE CASE

On May 31, 2012, Arturo Huerta was arrested for possession with intent to distribute a small amount of methamphetamine that was located in the vehicle that he was driving – a vehicle that did not belong to him. (CP 1, RP 380) The methamphetamine was found away from Mr. Huerta in a bag. (RP 399, 404) It weighed approximately five grams. (RP 161)

The arrest came after an alleged sale by Mr. Huerta at a Walmart store parking lot in Yakima, Washington. (RP 208) During this alleged sale in an informant's parked vehicle, a minor female stood 50 to 75 yards away. (RP 301-301) The minor female – the daughter of Mr. Huerta's lifetime friend – had arrived at the parking lot in Mr. Huerta's vehicle. (RP 173-174, 209) At the time of his arrest described above, the minor female was a passenger in the car that Mr. Huerta was driving. (RP 444)

Subsequent to charging Mr. Huerta with possession with intent to distribute the small amount of methamphetamine found in the vehicle at the time of his arrest, the State

amended its Information to include a charge of involving a minor in a controlled substance transaction. (CP 2) This charge was based on the transaction that was alleged to have occurred at the Walmart parking lot. (RP 11) The State did not charge Mr. Huerta with effecting the transaction itself. (RP 5-6) According to the State, the first count charging Mr. Huerta with possession with intent to distribute methamphetamine was based on the drugs in the car. (RP 24)

On the eve of trial, the defense filed a motion to dismiss, as the State had spent weeks not producing its informant and had finally revealed that it had been unable to locate its informant for months. (CP 21; RP 3) The State objected to the production of the informant on the basis that he was not a material witness. (CP 10; RP 13)

In the context of this motion, the court noted that the evidence regarding the alleged transaction would not be admitted for purposes of Count I, except as background information:

[T]he informant was gone by the time they searched the vehicle, and so *you're essentially making the argument that at this point the informant becomes, at most, a tipster* that would lead the police to end up searching a particular vehicle, right?

[H]ypothetically, if there were only Count I in this case, the police could say we had information that led us to obtain a search warrant to search this car, we found, you know, it was the Defendant's car, so on and so forth. *They wouldn't need to mention the C.I. other than saying we had a lead on it*, which obviously turned out apparently to be substantiated. So if there were only Count I, doesn't this whole issue of the informant go away?

(RP 32) (emphasis added)

The trial court held that the informant would not be necessary for purposes of the charge of possession but that the charge regarding the minor made the informant a material witness to whether there was even a transaction for which Mr. Huerta could involve a minor. (RP 53) The trial court also expressed concern that charging Mr.

Huerta with involving a minor in a transaction for which the State was not even charging Mr. Huerta could confuse the jury. (RP at 9) (“I’m just wondering if that might strike the jury as being odd...”)

The State asked that any interview of the informant be conducted *in camera* by the trial court. (RP 5) The court expressed concern that both Mr. Huerta and the public would have a right to be present at such a proceeding. (RP 33, 47) The parties agreed to a preliminary procedure that did not involve the court but instead had defense counsel interview the informant without obtaining his identity. (RP 49-50) The interview was to take place that afternoon. (RP 50) The trial already had begun. (RP 51, 54)

This procedure failed, as the State refused to allow questions that touched on identity, and the defense renewed the motion to dismiss. (CP 34; RP 60-63) The State believed it had objected properly. (RP 62-63) There was a CD recording of the interview that had been attempted by the defense. (RP 62) The defense continued to argue for disclosure of the informant’s identity. (RP 72, 73) The court ruled that it would interview the informant in the afternoon and asked that the parties submit questions to it. (RP 82, 89) The court also stated that it would listen to the CD over the lunch hour. (RP 96)

After lunch, Mr. Huerta withdrew his request to have the informant produced, so the informant was not interviewed by the court. (RP 107)

Prior to jury selection, the trial court also reviewed Mr. Huerta’s motions in limine, including his motions that speculative evidence of a romantic relationship between Mr. Huerta and the minor be barred, and that any out-of-court statements of the confidential informant be barred as hearsay. (CP 26-29; RP 96-99) The State agreed to

these motions. (RP 96) The State specifically represented that it was not going to reference the minor's statement "I love you" to Mr. Huerta while in police custody unless Mr. Huerta testified that he did not know her, or something to that effect. (RP 96)

The parties then proceeded to jury selection. (RP 144) At no time did the trial court conduct a Bone-Club analysis with regard to the *in camera* review of the CD interview of the informant.

During trial, the court held proceedings past 4 p.m. even though the Yakima County Courthouse is known for displaying signage and announcements on its website and phone system that the courthouse closed at 4:00 p.m. (See FN 2 *infra*)

For example, on February 21, 2013, jury voir dire was conducted from 4:00 to 4:30 p.m. (RP 151) On February 22, the detective on the case testified until 4:35 p.m., and a side bar initially kept from the public was described after that (for *Bone-Club* purposes), with court concluding at 4:42 p.m. (RP 325-330) On February 26, a witness testified until 4:17 p.m. with instructions discussed after. (RP 485-488)

At trial, there was testimony that police officers had organized a confidential informant to make a purchase of illegal narcotics from an individual who the police did not know, and to do so at the Walmart parking lot. (RP 199) Mr. Huerta drove into the Walmart parking lot and parked the car. (RP 208) He and a female exited the vehicle and looked around. (RP 209) The head of the police operation, Detective Horbatko, believed they were looking for the informant and he instructed the informant via cell phone to drive closer to where Mr. Huerta was. (RP 210) When the informant parked closer, Mr. Huerta approached the informant's vehicle while the female "peeled off" away from them towards the store, and was 50 to 75 yards away. (RP 301-302)

Detective Horbatko testified at trial that she continued looking around, while the female testified that she entered the store to buy female products. (RP 240, 445) The detective agreed that he did not watch the female exclusively, and that he did not know what she was doing or what she was thinking. (RP 303) He agreed that she could have been doing or thinking any number of things, such as looking for a friend or hoping to get the keys of the vehicle that Mr. Huerta had been driving. (RP 301-303) There was no evidence that Mr. Huerta gestured at her or gave her direction.

According to Detective Horbatko, he searched the informant's car and person before giving him \$1,200.00 in recorded "buy" money. (RP 204) But Detective Horbatko did not search the informant's socks, armpits, and possibly did not search his shoes or shirt, and did not strip search him. (RP 316) In addition, he typically "spot checked" when searching. (RP 320) He did not use a drug dog when searching the informant's car and did not search the informant's car as thoroughly as he searched the car that Mr. Huerta was driving. (RP 357)

Over defense objection that it violated hearsay and best evidence rules, Detective Horbatko (among others) was allowed to testify that he compared money taken from the minor at the time of arrest to the "buy" money that he had copied earlier and that the money matched. (RP 221, 236) It was at trial that the defense was first told that the photographs of money were missing. (RP 220)

During trial, several incidences suggested improper conduct by government officials. For example, contrary to representations before trial began, the prosecutor asked the minor's mother whether there was a romantic relationship between her daughter and Mr. Huerta. (RP 182-183) In response to a question about if the State

located property of Mr .Huerta to forfeit, Detective Horbatko answered no but then gratuitously stated, “I didn’t know anything else about him and he wouldn’t talk to the police.” (RP 351) Detective Horbatko volunteered that “the confidential informant didn’t say anything about a second person arriving.” (RP 209) There were several instances of comments made by the Detective Horbatko regarding safety and other issues – sometimes in response to questions, sometimes gratuitously offered – that appeared designed to inflame the jury’s emotions rather than speak to relevant evidence. Any objections to these comments were overruled. Examples of these kinds of comments included:

“I have personally been involved where there have been shootings that have taken place. I have been to scenes where shootings have taken place.” (RP 202) (Objection overruled)

“Very” (RP 198) (in response to question of whether undercover operations are dangerous) (objection overruled)

“[I]t’s extremely dangerous to put yourself in the place of a drug buyer or drug seller, whatever the case may be.” (RP 338)

“The drug world is extremely dark. It’s – there’s a lot of bad things that come from it and my informant could die.” (RP 340) (in response to a question of why he did not want to “burn” his informant by calling him as a witness) (objection overruled)

“We call it doper time” (RP 207) (in response to a question of whether it was expected for the transaction to not occur on time) (objection overruled)

At the end of the State’s case, the court initially reserved ruling on Mr. Huerta’s motion to dismiss and ultimately denied it. (RP 433, 489) The court stated that they were “pushing the envelope” with regard to the charge of involving a minor in a drug transaction because there was no guidance from the appellate courts as to when the transaction ends and the evidence regarding the minor having money on her person at the

time of detention may not be part of the alleged Walmart parking lot transaction. (RP 434) The court also held that the circumstantial evidence surrounding a transaction at the Walmart parking lot was sufficient for the government to overcome a hurdle on the charge of possession with intent to distribute methamphetamine. (RP 438) However, that holding contradicted the court's earlier assessment of the evidence for that particular count where the court had held that the evidence as to that count would not reference the prior alleged transaction except with a "tipster" kind of reference. (RP 32)

During closing, and contrary to his pretrial representations, the prosecutor argued that Mr. Huerta could be found guilty of the charge of possession with intent to distribute if it found that Mr. Huerta possessed a red cup on his way to the informant's vehicle that then was found to have methamphetamine in it, once retrieved from the informant:

Ladies and gentlemen, there was the methamphetamine in the car and there was also this methamphetamine in the fry box, in the red fry box. Ladies and gentlemen, he didn't constructively possess this methamphetamine, he actually possessed this methamphetamine and he actually possessed this methamphetamine. When he walked from his car to the confidential informant's car, he had the intent to deliver it. And when he got out, he didn't have it anymore.
....

So the State would submit to you that the evidence before you, circumstantial evidence and direct evidence, points that the Defendant intended to sell the methamphetamine in the car, and he intended to sell or deliver the methamphetamine in his hand as he was walking towards the vehicle.

(RP 496, 499)

Also during closing, the prosecutor seemed to argue that Mr. Huerta could be found guilty of involving a minor in a drug transaction if it found that Mr. Huerta possessed the drugs found in the car, in that he argued (a) the minor need not know of any criminal activity, (b) drugs were found "on her side between her legs," and (c) Mr. Huerta was not charged with delivery but with involving her "in a transaction to – to

unlawfully deliver meth. Right? It doesn't say in a transaction that results in an actual delivery." (RP 500, 504-505, 539)

As to instructions: the court offered repeatedly to give the jury interrogatories on the State's two theories of involvement – i.e., that the minor was a lookout at the Walmart parking lot, or that the minor held the "buy" money at the time of the arrest. (RP 157) The court made this recommendation to protect the case on appeal. (RP 157) The prosecution resisted this suggestion, writing a legal memorandum against it. (CP 96-103)

At sentencing, the trial court held that there was no evidence that the minor even knew that the drugs existed. (RP 562) The court reported that the jury told the court that it did not believe that the minor was a lookout and that it did not believe that she had the drug money until the police arrested the two individuals:

[T]hat's pretty far removed from the transaction. Now, whether this is going to hold up on appeal or not, I don't know. But again, it's hard to imagine how you could have a set of circumstances where there was still enough to convict somebody but that would be less than what there is in this case. I mean it is a really close case.

(RP 563)

Defense counsel orally renewed its motion to dismiss and moved for a judgment notwithstanding the verdict based on the evidence, including the information just provided by the court regarding the jurors' opinion of the evidence. (RP 565-567) Included in this motion was reference to the surprise at trial that the copy of buy money was not available, and how that surprise "compounded" the situation. (RP 566-567) The trial court denied the motion on the basis that defense counsel had not provided case law indicating when the transaction ends. (RP 567-568) The court stated, "Unless you can

come up with some authority that sheds some light on the question of when does the transaction end, I can't see my decision being any different.” (RP 568) The court indicated that it was an issue for the appellate court:

[W]hat the Court of Appeals, the Supreme Court's going to do with this, I think is a wide open question. But I have no way of -- I have no guidance, no way of knowing whether there is some legal limit to the scope of the transaction or whether it is always purely a factual question for the jury. I don't know. So *absent any such authority, I would deny any further motion with regard to Count II.*

(RP 568) (emphasis added)

The court then sentenced Mr. Huerta to 16 months on the first count of possessing methamphetamine with the intent to distribute it, and 51 months (the low end of the guideline range) to the count of involving a minor in a controlled substance transaction, concurrent to the sentence on the first count. (CP 137-144; RP 580)

This appeal followed. (CP 145)

E. ARGUMENT

Issue 1: The trial court violated both Mr. Huerta's right and the public's right to an open and public trial.

Alleged constitutional violations are reviewed de novo. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Whether a trial court procedure violates the right to a public trial is a question of law reviewed de novo. *State v. Njonge*, 161 Wn. App. 568, 573, 265 P.3d 753 (2011). Courtroom closure issues may be argued for the first time on appeal. *Id.* at 576.

The state and federal constitutions require that criminal cases be tried openly and publicly. U.S. Const. Amend. 1, VI, XIV; Wash. Const. Article 1, Sections 10 and 22; *State v. Bone-Club*, 128 Wn.2d 254, 259, 906 P.2d 325 (1995); *Presley v. Georgia*, 558 U.S. 209, 130 S. Ct. 721 (2010) (per curiam). Proceedings may be closed only if the trial

court enters appropriate findings following a five-step balancing process. *Bone-Club*, 128 Wn.2d at 258-59.¹ Failure to conduct proper analysis requires reversal, even if the accused person did not make a contemporaneous objection. *Bone-Club*, 128 Wn.2d at 257, 261-62. In addition, the court must consider all reasonable alternatives to closure, whether or not the parties suggest such alternatives. *Bone-Club*, 128 Wn.2d at 259; *Presley*, 558 U.S. at 724-25. “[P]rejudice is presumed where a violation of the public trial right occurs.” *State v. Bone-Club*, 128 Wn.2d at 261-62 (citing *State v. Marsh*, 126 Wash. 142, 146-47, 217 P. 705 (1923)).

The right to an open and public trial belongs to both the public and the defendant:

A public trial is a core safeguard in our system of justice. Be it through members of the media, victims, the family or friends of a party, or passersby, the public can keep watch over the administration of justice when the courtroom is open. The open and public judicial process helps assure fair trials. It deters perjury and other misconduct by participants in a trial. It tempers biases and undue partiality. The public nature of trials is a check on the judicial system, which the public entrusts to adjudicate and render decisions of the highest import. It provides for accountability and transparency, assuring that whatever transpires in court will not be secret or unscrutinized. And openness allows the public to see, firsthand, justice done in its communities. The right to a public trial is so important, in fact, that *its violation is an error deemed structural: the error affects the framework within which the trial proceeds*. We cannot lightly abandon the values of a public trial.

State v. Wise, 176 Wn.2d 1, 6, 288 P.3d 1113 (2012) (emphasis added).

There is a strong presumption that courts are to be open at all stages of trial. *State v. Sublett*, 176 Wn.2d 58, 70, 292 P.3d 715 (2012) (plurality opinion). “Trial courts are

¹ This criteria includes: “(1). The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused’s right to a fair trial, the proponent must show a “serious and imminent threat” to that right. (2). Anyone present when the closure motion is made must be given an opportunity to object to the closure. (3). The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests. (4). The court must weigh the competing interests of the proponent of closure and the public. (5). The order must be no broader in its application or duration than necessary to serve its purpose.” *Bone-Club*, 128 Wn.2d at 258-59 (alteration in original). Accord, *In re Orange*, 152 Wn.2d 795, 812, 100 P.3d 291 (2004); *State v. Wise*, 176 Wn.2d 1, 288 P.3d 1113 (2012); *State v. Paumier*, 176 Wn.2d 29, 288 P.3d 1126 (2012).

obligated to take every reasonable measure to accommodate public attendance at criminal trials...” *State v. Leyerle*, 158 Wn. App. 474, 478, 242 P.3d 921 (2010). This public trial right includes “open and accessible proceedings.” *Leyerle*, 158 Wn. App. at 479-80 (citing *State v. Easterling*, 157 Wn.2d 167, 174, 137 P.3d 825 (2006)).

While this right is not inflexible, failure to even consider the *Bone-Club* factors is structural error requiring reversal. *Wise*, 176 Wn.2d at 6.

In this case, there are two instances of a lack of an open and public trial. Both instances involve the taking of evidence and other adversarial proceedings and thus both are subject to the open and public trial laws and requirements. *State v. Rivera*, 108 Wn. App. 645, 652-53, 32 P.2d 292 (2001) (quoting *Ayala v. Speckard*, 131 F.3d 62, 69 (2d Cir. 1997)) (“The public trial right applies to the evidentiary phases of the trial, and to other ‘adversary proceedings’ Thus, a defendant has a right to an open court whenever evidence is taken, during a suppression hearing, and during voir dire”); *Press-Enter. Co. v. Superior Court of California*, 464 U.S. 501, 104 S.Ct. 819 (1984).

As to the first instance: The trial court’s review of the audio CD in chambers pretrial, in preparation for afternoon proceedings where it would interview the informant, was a violation of an open and public trial and requires reversal. As noted in the Statement of the Case, *supra*, the trial court expressed concerns regarding *Bone-Club* issues ahead of time, and encouraged the parties to have defense counsel conduct the interview so that the court would not be put in the position of having to consider *Bone-Club* issues. That very interview, recorded on a CD rather than taking place live, then was before the court in chambers, with the court’s own promise to review it – but without the proper *Bone-Club* analysis which the court already acknowledged was necessary.

This is structural error, requiring reversal. *Wise*, supra, at 6.

As to the second instance: This lack of an open and public trial at a critical stage of proceedings was exacerbated by the fact that court was conducted past 4 p.m. at the Yakima County Courthouse, which is known to post “closed” signs of 4 p.m. along with announcing court closure at 4 p.m. on the county’s website and telephone system.² Thus, even while signage showed that there were no court proceedings in progress, the trial continued past 4 p.m. on at least three separate occasions. On February 21, jury voir dire was conducted from 4 to 4:30 p.m. (RP 151) On February 22, the detective on the case testified until 4:35 p.m., and a side bar initially kept from the public was described after that (ironically for *Bone-Club* purposes), with court concluding at 4:42 p.m. (RP 325-330) On February 26, a witness testified until 4:17 p.m. with instructions discussed after. (RP 485-488)

Due process guarantees the right to an open and public trial. If the public is not “aware” of the open and public proceedings, this right loses all meaning. See *Press-Enter.*, 464 U.S. at 509. And while the test of what is reasonable has not been definitively described in Washington, taking no precautions whatsoever certainly does not meet the bar. Cf. *Haas v. Warden, SCI Somerset*, 760 F.Supp.2d 484, 488-89 (E.D. Pa. 2010) (in order to protect the public trial right when the courthouse closed due to a power outage, the judge personally informed the media that open proceedings would be held at the nearby firehouse, security guards were posted at the courthouse doors to direct

² This is a pattern and practice at the Yakima County Courthouse. However, Mr. Huerta recognizes that additional evidence may need to be taken to determine if that practice was followed on the days of his particular trial. As such, to the extent necessary, Mr. Huerta asks for a remand to the trial court for the taking of evidence on this point.

inquiring members of the public to the alternate forum, and a sign was posted outside the courthouse directing the public to the open trial at the firehouse public forum).

Here, the particular procedures of the courthouse barred reasonable access to the trial without *Bone-Club* analysis. Reversal is warranted.

Issue 2: The evidence was insufficient to sustain a conviction on involving a minor in a controlled substance transaction and of possession with intent to distribute a controlled substance.

While reversal is warranted due to violation of the open and public trial requirements, remand for new trial is improper in this case because the evidence at trial was insufficient to sustain either conviction. Instead, this Court should reverse and remand with instructions to dismiss.

The State must prove each element of a charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068 (1970). To determine whether sufficient evidence exists to sustain a conviction, this Court reviews the evidence in the light most favorable to the State to determine whether “any rational trier of fact could have found guilt beyond a reasonable doubt.” *State v. Romero*, 113 Wn. App. 779, 797, 54 P.3d 1255 (2002) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)); *State v. Wilson*, 141 Wn. App. 597, 608-09, 171 P.3d 501 (2007) (citing *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980)). 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). Any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* “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)).

a. The evidence is insufficient to show that Mr. Huerta took action to involve the minor in the alleged transaction when there was no evidence that Mr. Huerta took such action in the parking lot, and evidence of any other action taken was not during the transaction.

Mr. Huerta was convicted of involving a minor in a controlled substance transaction under RCW 69.50.4015 (formerly RCW 69.50.401(f)).

In order to be convicted of this charge, the State must prove that (a) there was a transaction unlawfully to sell or deliver a controlled substance and (b) the defendant unlawfully compensated, threatened, solicited, or in any other manner involved a minor in that transaction. RCW 69.50.4015.

It is not enough to allow a minor to remain at such a transaction. *State v. Flores*, 164 Wn.2d 1, 186 P.3d 1038 (2008). Having a minor in proximity to a transaction is also insufficient. *Id.* at 13-14 (where Court notes examples of activity that is prohibited by other statutes but not this one: e.g., sentencing enhancement for committing domestic violence “within sight or sound” of a minor, or enacting enhanced penalties for drug transactions that take place within 1,000 feet of a school bus stop, public parks, schools, etc., or making it unlawful to have minor “on premises” of drug manufacturing). As noted in *Flores*, it is “significant that when the legislature wants to protect children from the harmful effects of exposure to criminal activity, it knows how to say so.” *Flores*, 164 Wn.2d at 13-14. Here, proximity to the transaction and remaining at the transaction are not encompassed in this criminal liability. As explained in *Flores*:

When viewing the phrase “or in any other manner involve” in light of the words immediately preceding it (“compensate, threaten, solicit”), it is clear the legislature did not intend to encompass the act of exposing a child to an unlawful drug transaction. Each of these words describes an act directed at the minor whereby the defendant *brings, or attempts to bring, the minor into* the transaction in some way.

Flores, 164 Wn.2d at 13 (emphasis added). Thus, the State must prove that the defendant took an action to involve the minor for there to be a conviction under the statute. *Id.* at 24 (“The statute requires evidence that the defendant committed some act, directed at the minor, to bring or attempt to bring the minor into the transaction”).

In this case, the State had two theories under which it intended to prove this case. Its first theory was that Mr. Huerta used the minor as a lookout for him at the Walmart parking lot. Its second theory was that Mr. Huerta gave the minor the alleged “buy” money to put in her shirt so as he could avoid detection.³

In fact, the State presented no evidence of the minor’s involvement in the alleged transaction at all, since it was alleged to have occurred 50 to 75 yards away from her. Without even her proximity to the transaction itself, there can be no allegation that Mr. Huerta “involved” her in it. As noted above, mere proximity is not sufficient. *Flores*, *supra*.

Even if the State can surmount that hurdle, however, it is devoid of sufficient proof for either of its two theories.

As to the first theory, the State did not present evidence of any step that Mr. Huerta took that involved the minor in the transaction that was alleged to take place in the

³ The State also seemed to argue that bringing the minor to the transaction was sufficient to convict on this charge, but the Court in *Flores* specifically noted that bringing a minor in a car to a drug transaction was insufficient evidence of “involving” a minor. *Flores*, at 16-17. Thus Mr. Huerta bringing the minor to Walmart is insufficient to sustain the conviction.

Walmart parking lot. The minor stood 50 to 75 yards – almost a football field away – from the alleged transaction. Though the detective testified that she was looking around (and implied that she was a lookout), there was no evidence that Mr. Huerta directed her to look around – an essential element of the crime. Without evidence of an action by Mr. Huerta, the conviction must fail under this theory.

Moreover, and as the detective testified, there was no evidence that the minor was a lookout since the minor could have been doing any one of a number of things, all of which were possible under the circumstances. See e.g., *State v. Aten*, 130 Wn.2d 640, 656, 927 P.2d 210 (1996) (“corpus delicti is *not* established when independent evidence supports reasonable and logical inferences of both criminal agency and noncriminal cause”) (emphasis in original). In fact, the only evidence in that regard came from the minor, who testified that Mr. Huerta did not involve her. (RP 447-448)

Ultimately, the jury informed the court that it did not believe that the minor was a lookout. (RP 563) And the court found during sentencing that there was no evidence that the minor was aware of the transaction. (RP 563)

Given the jury’s revelation and the court’s finding at sentencing that there was no evidence that the minor knew of the transaction, the conviction may not be sustained under a theory that the minor was acting as a lookout for the alleged transaction at the time it occurred.

As to its second theory, the State surmised that Mr. Huerta gave the minor money he obtained from the alleged transaction as a way of avoiding detection at the time of his arrest. Yet the arrest occurred “pretty far” from the alleged transaction (as the trial court

found). (RP 563) And the jury did not believe that the minor was in possession of money until the time of the arrest. (RP 563)

At best, this evidence (i.e., that the minor possessed \$1,100.00 of funds) only shows the minor involved *after* the transaction and not in the transaction itself. Cf. RCW 9A.76.070 (a person is guilty of being an accessory after the fact if he, *inter alia*, conceals evidence).

The trial court expressed concern about this theory of the State as well, stating that it was unclear of when the “transaction” ended. The court sought and expected guidance from the appellate courts on this issue. (RP 563)

Here, while there is no case on point, an individual being given money at the time of a traffic stop “pretty far” away from the alleged transaction is not someone complicit, participating or involved in the transaction but is, at best, an accessory after the fact. Under this law in particular, where the law does not prohibit proximity of a minor, and does not prohibit a minor to be involved during possession of a controlled substance pending (or after) a drug transaction, the law should not be stretched to include actions taken well after the alleged transaction itself is over.

The law does not provide for conviction under either of the State’s theories. Even if it provided for a conviction under one of the theories, however, the State has forfeited any right to retrial because it failed to accept the trial court’s offer for jury interrogatories. Instead it preferred to play the game of Russian roulette. This is akin to the State forcing a mistrial by goading a defendant into requiring a mistrial and then attempting to retry the defendant later without regard for Double Jeopardy concerns. Cf. *Oregon v. Kennedy*,

456 U.S. 667, 676, 102 S. Ct. 2083 (1982) (under such circumstances, the defendant cannot be retried).

The Double Jeopardy clause is the source of the general principle that “the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.” *Arizona v. Washington*, 434 U.S. 497, 505, 98 S. Ct. 830 (1978). Here the State was satisfied with lumping together all of its theories of prosecution without the use of jury interrogatories. Its lack of risk-taking aversion should not be imputed to Mr. Huerta, and if this Court is to decide that one (but not both) of the State’s theories was viable on this charge, it should not remand for retrial on the basis that the State itself asked for this result by refusing the court’s offer of jury interrogatories.

Finally, in order to convict Mr. Huerta of this crime, the State must prove that a sale of a controlled substance occurred. Mere possession with intent to distribute, for example, is not prohibited action under RCW 69.50.4015. The State has failed in the proof of this element as well.

A delivery is “the actual or constructive transfer from one person to another of a substance...” RCW 69.50.101(f). Because there is no statutory definition of transfer, court have looked to the dictionary and found “transfer” to mean “to cause to pass from one person or thing to another.” *State v. Martinez*, 123 Wn. App. 841, 846-47, 99 P.3d 418 (2004). The hallmark of a delivery is testimonial evidence that the defendant sold or relinquished drugs to another person. See e.g., *State v. Hernandez*, 85 Wn. App. 672, 676, 935 P.2d 623 (1997) (evidence sufficient because officers saw exchange of bindles for money with binoculars and later found same type of bindles with drugs in them on the sellers, in a case where the buyers did not testify).

Whether evidence is sufficient to sustain a conviction for sale when the government fails to call its informant – the only witness to the alleged transaction – has been considered in at least two federal cases. See *United States v. Gaytan*, 649 F.3d 573 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 1129 (2012); *United States v. Tavaréz*, 626 F.3d 902 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 1713 (2011). Both cases considered the argument that lack of testimony as to the hand-to-hand transaction resulted in insufficient evidence, but rejected that argument in these cases due to the fact that there existed evidence (including a tape recording of the transaction) that gave the evidence its sufficiency and took away any “innocent” explanation for the activity. See e.g., *Gaytan*, 649 F.3d at 578.

Here, the State chose not to present the informant as a witness – the only individual who could testify about what occurred in the vehicle. It had no other evidence of what occurred between Mr. Huerta and the informant – no tape recording, no evidence of gestures – nothing. Without more, the decision not to call the informant regarding what occurred means that innocent explanations transfer; there was insufficient evidence to prove that it occurred.

b. The evidence is insufficient to show that Mr. Huerta possessed with intent to distribute the small amount of methamphetamine found in a bag in the back seat of the car he was driving.

Mr. Huerta was convicted of possession with intent to distribute a controlled substance (in this case, methamphetamine). RCW 69.50.401.

In order to be convicted of this charge, the State must prove that the defendant (a) possessed (b) with intent to distribute (c) a controlled substance (methamphetamine in this case). RCW 69.50.401; *State v. Hagler*, 74 Wn. App. 232, 235, 872 P.2d 85 (1994).

Mere possession of a controlled substance is not enough to support an inference of intent to deliver, even if the amount is greater than what is deemed usual for personal use. *State v. Zunker*, 112 Wn. App. 130, 135, 48 P.3d 344 (2002). Possession must be coupled with substantial corroborating evidence to show intent. *State v. Brown*, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). The additional factor may be an officer's observations of deals, large amounts of cash, scales, the presence of cutting agents, or many unused parcels. *Brown*, 68 Wn. App. at 483-484.

Here, the amount found in a vehicle owned by someone other than Mr. Huerta was only about five grams, and no other drug-type activity was demonstrated in the form of scales and the like. Given the evidence upon which the State relied, the evidence was insufficient for this conviction.

In denying the motion to dismiss this count, the court held that the evidence of the earlier transaction at the Walmart parking was sufficiently additional information to conclude that Mr. Huerta possessed with intent to distribute the five grams of controlled substance found in the vehicle for purposes of denying the motion for judgment of acquittal. And it is true that a factfinder may infer that a defendant possessed a controlled substance with intent to deliver based on evidence that he delivered a substance to a person before arrest. *State v. Hernandez*, 85 Wn. App. at 676. But, as explained above, the evidence regarding the alleged transaction was insufficient. Moreover, it was the trial court that indicated that the evidence related to the alleged transaction in the parking lot would not be used with regard to the charge of possession of methamphetamine in the car, except as information from a "tipster." (RP 32) As such, reliance on this evidence

which otherwise would not have been admitted is improper for purposes of deciding the sustainability of this conviction.

Issue 3: The prosecutor impermissibly amended the charges against Mr. Huerta during closing argument.

The state and federal constitutions require that an individual be informed of the charges he or she must face at trial. Wash. CONST art. 1, § 22 (“the accused shall have the right ... to demand the nature and cause of the accusation against him”); U.S. Const., Sixth Amendment. The Washington Supreme Court has stated that “[i]t is fundamental that under our state constitution an accused person must be informed of the criminal charge he or she is to meet at trial, and cannot be tried for an offense not charged.” *State v. Schaffer*, 120 Wn.2d 616, 621, 845 P.2d 281 (1992). Such notice may come in the form of the charge or in the form of a bill of particulars, which may be orally delivered. See *State v. Noltie*, 116 Wn.2d 831, 845, 809 P.2d 190 (1991) (the function of a bill of particulars is to allow the defense to prepare for trial by providing it with sufficient details about the charge and eliminating surprise); *State v. Hockaday*, 144 Wn. App. 918, 923, 184 P.3d 1273 (2008), affirmed on remand, 204 P.3d 283 (2009) (bill of particulars was oral).

This constitutional right to notice is violated where the State amends the Information after resting its case in chief when the amendment is not to a lesser degree of the same offense or to a lesser included offense. *State v. Pelkey*, 109 Wn.2d 484, 487, 745 P.2d 854 (1987); accord, *State v. Markle*, 118 Wn.2d 424, 436-37, 823 P.2d 1101 (1992). In such a case, prejudice is presumed. *Pelkey*, 109 Wn.2d at 491; *Markle*, 118 Wn.2d at 436-37. Mismanagement and arbitrary action of the prosecution that prejudices defense counsel’s ability to adequately prepare for trial denies the defendant of his Sixth

Amendment right to counsel and justifies dismissal of the cause. *State v. Sherman*, 59 Wn. App. 763, 772, 801 P.2d 247 (1990); *State v. Teems*, 89 Wn. App. 385, 948 P.2d 1336 (1997).

Here, the State affirmed that it was not prosecuting Mr. Huerta for the delivery, and stated that the charge of possession with intent to distribute methamphetamine was based on the methamphetamine found in the vehicle. It also agreed that, to be found guilty of involving a minor in a controlled substance transaction, it must rely on the transaction that was alleged to have occurred in the Walmart parking lot. But at closing, the State switched up these theories of prosecution. It specifically informed the jury that it could convict Mr. Huerta of possession with intent to distribute methamphetamine if the jury found that Mr. Huerta carried methamphetamine to the informant's vehicle. This is a far cry from the case it asserted that it intended to prove – i.e., that the presence of five grams of methamphetamine in a bag away from Mr. Huerta in a car that Mr. Huerta did not own was sufficient evidence of Mr. Huerta possessing with intent to distribute methamphetamine. Likewise, the switch to asserting that finding drugs at the minor's feet was sufficient to prove that Mr. Huerta involved the minor not only fell outside of the allegation but fell outside the statute as well (since possession with intent to distribute a controlled substance is insufficient for purposes of a conviction of involving a minor in a controlled substance transaction under RCW 69.50.4015).

Prejudice is presumed, see *Pelkey*, supra, but it is also clear. Not only was the evidence on both counts weak – in fact, insufficient – but the State already had obtained concessions from Mr. Huerta on the basis of its proffered allegations, including the concession that he would not seek to reveal the identity of the confidential informant.

Moreover, the amendment came during closing argument, making it impossible for Mr. Huerta to defend against it through cross examination or the presentation of evidence.

This was an improper variance and/or constructive amendment of the charges against Mr. Huerta. It also was misconduct, as described in Issue 5, *infra*, as it was a misstatement of law and facts and belied its original representation of the theories of the charges. The conviction should be reversed.

Issue 4: The trial court erred when it allowed testimony of the comparison of “buy” money to a photograph taken of that same alleged “buy” money when both the money and the photograph were no longer available for inspection or trial.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. ER 801(c). “Whether the statement is hearsay depends upon the purpose for which it is offered. If it is offered to prove the truth of the matter asserted, the evidence is hearsay. If it is offered for some other purpose, it is not.” 5B K. Tegland, *Wash. Prac., Evidence* § 333, at 19 (1989). It can be “an oral or written assertion ... other than one made by the declarant while testifying at trial...” ER 801(a), (c).

Hearsay may be omitted if it falls under an exception, such as a business records exception. ER 801, 803. But an exception must apply, or admission of it as hearsay is error. Improper admission of hearsay implicates a defendant’s constitutional right to confront witnesses. *State v. Kreck*, 86 Wn.2d 112, 116-17, 542 P.2d 782 (1975).

In conjunction with the hearsay rule is the best evidence rule. *In re Adolph*, 170 Wn.2d 556, 557, 243 P.3d 540 (2010). The rule applies when a party is attempting to prove the contents of a writing. ER 1001-04. The rule typically requires the use of the original writing, or a duplicate, to prove the contents of the writing. ER 1002-03.

Here, over defense objection, the detective testified with regard to his comparison of a copy of buy money and the money found on the minor and testified that they were the same – i.e., for the truth of the matter asserted – even though he no longer had either the money itself or a photocopy of the money. This was error.

In a case quite similar, the Washington Supreme Court ruled that it was reversible error to allow this kind of testimony. See *State v. Fricks*, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1979). In *Fricks*, the defendant was found guilty of second-degree burglary for allegedly stealing money from a gas station. The manager of the gas station testified that employees maintained a tally sheet where they recorded the day's receipts and, over defense objection, the manager testified that the tally sheet established that the daily receipts on the day of the robbery had been \$102. *Id.* The tally sheet was not produced at trial, and this required reversal of the conviction as to the amount of the alleged theft. *Id.* at 397. See also *State v. Modesky*, 15 Wn. App. 198, 203, 547 P.2d 1236 (1976) (where testimony came from an administrator who had reviewed roster and testified that defendant's name was not on it, but State did not produce the roster, it was reversible error); cf. *State v. Mahmood*, 45 Wn. App. 200, 204, 724 P.2d 1021 (1986) (no error when witness testified that he did not recall without referencing documents, but only because the contents of the missing documents were not referenced either).

Other jurisdictions have noted that “buy” money and a comparison of serial numbers is hearsay. See e.g., *State v. Borchert*, 284 N.W.2d 120 (Wis. App. 1979) (serial numbers were hearsay but admissible under residual exception to the hearsay rule and required evaluation of the reliability of the hearsay proffered – i.e., it needed the “circumstantial guarantee of reliability”); *People v. Strother*, 290 N.E.2d 201 (Ill. 1972)

(list of serial numbers is in fact hearsay but is admissible under past recollection recorded); *Reaves v. State*, 316 S.W.2d 824 (Ark. 1958) (statement from witnesses that they compared serial numbers could be hearsay, but fact that objection was not preserved at trial was dispositive).

This matter is akin to the *Strother* case – i.e., past recollection recorded – but without the documents that would be used to show the record. This was error.

The trial court could have allowed testimony that a certain amount of money was given to the informant, and a certain amount of money was taken from the minor. But allowing testimony regarding a comparison of the money, without the documentation used for that comparison, was error.

And the error was not harmless. It violated Mr. Huerta's right to confront witnesses, so it is error of constitutional magnitude. See *State v. Jasper*, 158 Wn. App. 518, 526, 245 P.3d 228 (2010).

A constitutional error is harmless if “the appellate court is assured beyond a reasonable doubt that the jury verdict is unattributable to the error.” The Court looks to the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *State v. Anderson*, 171 Wn.2d 764, 770, 254 P.3d 815 (2011). “If there is no reasonable probability that the outcome of the trial would have been different had the error not occurred, the error is harmless” under that standard. *Id.* (quotation omitted).

Here, the officer was allowed to testify as to accuracy and consistency based on observation that is now unavailable for cross examination or inspection, and is not based on information that the officer currently has at its disposal. Instead, we must trust him to speak accurately. This is the entire purpose behind the hearsay rule – that this not be

allowed. And the evidence otherwise was scant. The State had chosen not to have its informant testify, so there was no witness to what actually occurred in the vehicle.

Allowing the State to present this hearsay evidence was critical to the State's ability to convict, making it reversible error.

Issue 5: The prosecution committed misconduct when it commented on Mr. Huerta's post-arrest silence, presented other impermissible hearsay, elicited testimony intended to inflame the jury, and constructively amended the charges in argument that misrepresented the law and its previous representations.

It is well-settled that, as quasi-judicial officers, prosecutors have a duty to ensure that an accused receives a fair trial. *Berger v. United States*, 295 U.S. 78, 88, 55 S. Ct. 629 (1935), overruled in part and on other grounds by *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270 (1960); *State v. Suarez-Bravo*, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). As part of that duty, prosecutors are required to refrain from engaging in conduct at trial which is likely "to produce a wrongful conviction." *State v. Clafin*, 38 Wn. App. 847, 850, 690 P.2d 1186 (1984), *review denied*, 103 Wn.2d 1014 (1985).

Because of his role, the words of a prosecutor carry great weight with the jury, so that a prosecutor's misconduct does not just violate his duties but also deprive the defendant of his state and federal constitutional due process rights to a fair trial. See *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868 (1974); *Suarez-Bravo*, 72 Wn. App. at 367. In addition, when a prosecutor's comments invite the jury to draw a negative inference from a defendant's exercise of a constitutional right, those comments are constitutionally offensive misconduct because they "chill" the defendant's free exercise of that right. *State v. Belgarde*, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); *United States v. Jackson*, 390 U.S. 570, 581, 88 S. Ct. 1229 (1965). As a result, it is grave misconduct for the prosecutor to make such arguments. *State v. Rupe*, 101 Wn.2d

664, 705, 683 P.2d 571 (1984); see *Griffin v. California*, 380 U.S. 609, 614, 85 S. Ct. 1229 (1965).

A prosecutor's cumulative improper action may be so flagrant or pervasive that instructions cannot cure it. *In re Glasman*, 175 Wn.2d 696, 286 P.3d 673, 679 (2012) (images improperly "inflamed the jury" and reversal was mandatory).

As a state agent, the prosecuting attorney represents the people and presumptively acts with impartiality in the interest of justice. *State v. Fisher*, 165 Wn.2d 727, 746, 202 P.3d 9337 (2009). Defendants are among the people the prosecutor represents, so the prosecutor owes a duty to defendants to see that their rights to a constitutionally fair trial are not violated, and must function within boundaries while zealously seeking justice. *State v. Monday*, 171 Wn.2d 667, 676, 257 P.3d 551 (2011).

If a defendant establishes that the State made improper statements, and in cases (like this one) where the defense objected to the comments, the appellate court reviews whether the improper comments prejudiced the defendant by affecting the jury. *State v. Emery*, 174 Wn.2d 741, 760, 278 P.3d 653 (2012).

A witness's misconduct which deprives an individual of a fair trial violates the individual's right to due process guaranteed by the Fourteenth Amendment to the United States Constitution. *State v. Taylor*, 60 Wn.2d 32, 36-37, 371 P.2d 617 (1962) (police witness's deliberate reference to the fact defendant had a parole officer violated due process and required a new trial); *State v. Devlin*, 145 Wash. 44, 51-52, 258 P. 826 (1927) (due process violated by witness's reference to inflammatory and irrelevant evidence). "The touchstone of due process analysis is the fairness of the trial, i.e., did the

misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause?" *Smith v. Phillips*, 455 U.S. 209, 102 S.Ct. 940 (1982).

The ultimate inquiry is not whether the error was harmless, but rather whether the impropriety violated the defendant's due process rights to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). Witness misconduct generally involves a witness providing intentionally inadmissible and unsolicited testimony or engaging in extraordinary conduct likely to prejudice the trier of fact. See *Taylor*, 60 Wn.2d at 33-35 (witness intentionally injected impermissible testimony); *Storey v. Storey*, 21 Wn. App. 370, 373-74, 585 P.2d 183 (1978) (witness purposely injected impermissible testimony to influence the jury), *review denied*, 91 Wn.2d 1017 (1979); *State v. Harstad*, 17 Wn. App. 631, 638, 564 P.2d 824 (1977) (witness cried and embraced one of the defendants), *review denied*, 89 Wn.2d 1013 (1978). It has been recognized that witness' misconduct can require a new trial. *Taylor*, 60 Wn.2d at 37; *Devlin*, 145 Wash. at 51.

Here, the State's agents were the prosecutor and Detective Horbatko. Whether as a witness or as a State agent, the actions of both prejudiced the trial and require reversal.

As outlined in the Statement of the Case, Detective Horbatko (either on his own initiative or due to a question by the prosecutor) testified to various prejudicial issues regarding danger and safety that simply were not relevant to the case at hand. This was error, and is reversible error, especially given the scant evidence here. The detective also improperly commented on Mr. Huerta's silence, and also commented on the informant's statements (in that he testified that the informant did not tell him that another person was coming to the alleged transaction). All these incidences are error, either attributed to the

State as a state actor or as a witness who is intentionally acting out, in violation of Mr. Huerta's due process rights.

In some instances the prosecutor was complicit, as the testimony was elicited based on the prosecutor's specific questions seeking the inflammatory and irrelevant comments. In others, the prosecutor was simply the pawn of Detective Horbatko, who likely was attempting to bolster the case with improper asides as a way of obtaining a conviction on this weak and reversible case. Whether by prosecutorial design or witness impropriety, however, reversal is warranted due not just to the behavior itself but due to the fact of prejudice, given how shaky the evidence was already.

And on his own, the prosecutor violated the agreement pretrial – pursuant to a motion in limine filed by Mr. Huerta – that the State would not make speculative inquiry about the irrelevant issue – without foundation – of a romantic relationship between the minor and Mr. Huerta. This caused the potential for significant prejudice in that the jury could focus on the allegation of romance rather than on the facts and issues at hand. This was why the defense filed a motion in limine; this is why the prosecutor agreed to refrain from making these kinds of highly speculative, highly inflammatory inquiries. Violation of the pretrial order is reversible error on this ground as well.

Also on his own, and during closing argument, the prosecutor committed misconduct by improperly amending both charges (as outlined in Issue 3, *supra*) by misstating the facts upon which Mr. Huerta was tried and misstating the law (for Count 2) by appearing to state a theory that encouraged a conviction based on mere possession of methamphetamine rather than on the alleged transaction in the Walmart parking lot. Both actions are misconduct given the fact that the State is not to argue questions of law not

covered by the instructions, or are in conflict with the instructions. *State v. Davenport*, 100 Wn.2d at 759; *State v. Estill*, 80 Wn.2d 196, 199, 492 P.2d 1037 (1972).

Exacerbating the inclusion of some of this evidence was the trial court's overruling objections regarding them. The appellate court reviews a trial court's admission of evidence for abuse of discretion. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306, *review denied*, 108 Wn.2d 1033 (1987). Under these circumstances, the trial court's allowance of inflammatory comments by the witness and questioning by the prosecutor should result in the granting of a new trial or an instruction (on remand, due to the above issues outlined) that the prosecutor and its witnesses are to refrain from such gratuitous, self-serving, inflammatory and irrelevant testimony and comments.

Issue 6: Cumulative error requires reversal.

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) (citing *Walker v. Engle*, 703 F.2d 959, 963 (6th Cir.1983)), 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.

Here, we have submitted several errors – some of constitutional magnitude and all affecting the outcome of this jury trial, where the evidence was tenuous at the outset and where we have argued that the evidence is insufficient as to the two counts. 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.

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 31501-1-III
vs.) No. 12-1-00838-3
)
ARTURO LUNA HUERTA) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on October 31, 2013, having obtained prior permission from the Yakima County Prosecutor's Office, I served the State by email as follows:

David Trefry
128 N 2nd St Rm 211
Yakima WA 98901-2639
TrefryLaw@wegowireless.com

I also mailed a true and correct copy of the same by U.S. mail, postage prepaid to:

Arturo L. Huerta, #364481
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

Dated this 31st day of October, 2013.

/s/ Kristina M. Nichols
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