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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 322157

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT GENE WATTS, Appellant.

BRIEF OF APPELLANT

John R. Crowley

Attorney for Appellant

The Crowley Law Firm, P.L.L.C.

216 1st Avenue South

Suite 204

Seattle, Washington 98104

Tel (206) 625-7500 ♦ Fax (206) 625-1223

TABLE OF CONTENTS

I.	<u>ASSIGNMENTS OF ERROR</u>	1
II.	<u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u>	1
III.	<u>STATEMENT OF THE CASE</u>	2
IV.	<u>ARGUMENTS</u>	10
	A. The trial court erred in relying on information provided by criminal informant, Lyle Long, to support probable cause that Mr. Watts engaged in any criminal activity because Mr. Long was unreliable and incredible; thus, such information is insufficient to pass the requisite <i>Aguilar-Spinelli</i> test and the State lacked probable cause absent that information	10
	B. Mr. Watts was denied his constitutional due process right to a fair trial when the court allowed the jury to hear testimony of the transaction on December 7, 2012; this testimony tainted the jury because this transaction in no way implicated Mr. Watts in wrongdoing either directly or indirectly	21
	C. There was insufficient evidence to prove all the elements of the crime, beyond a reasonable doubt, when Lyle Long, the confidential informant, was the only individual to have witnessed Mr. Watts allegedly handle methamphetamine during the January 4, 2013 transaction; and Mr. Long was not “wired,” or have any video or audio recording equipment on his person to document the transaction and the task force detectives had only binoculars to view the January 4, 2013 transaction	22
	D. Cumulative error violated Mr. Watts’s constitutional due process right to a fair trial	26
V.	<u>CONCLUSION</u>	27

TABLE OF AUTHORITIES

U.S. Constitution

Amendment V and XIV26

U.S. Federal Court Cases

United States v. Canieso, 470 F.2d 1224 (2d Cir. 1972)12

Washington Supreme Court Cases

State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984).....26

State v. Darden, 145 Wn.2d 612, 41 P.3d 1189 (2002).....21

State v. Davenport, 100 Wn.2d 757, 675 P.2d 1213 (1984).....26

State v. Green, 94 Wn.2d, 216, 616 P.2d 628 (1980).....22

State v. Jackson, 102 Wn.2d 432, 688 P.2d 136 (1984).....12, 13, 15, 16

State v. Lair, 95 Wn.2d 706, 630 P.2d 427 (1981).....11

State v. Powell. 126 Wn.2d 244, 893 P.2d 615 (1995).....21

State v. Salinas, 119 Wn.2d 192, 829 P.2d 1068 (1992).....22

State v. Woodall, 100 Wn.2d 74, 666 P.2d 364 (1983).....12

State v. Young, 123 Wn.2d 173, 867 P.2d 593 (1994).....12, 17, 20

Washington Appellate Court Cases

State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992).....26

State v. Duncan, 81 Wn. App. 70, 912 P.2d 1090 (1996).....

.....11, 12, 17, 18, 19, 20

State v. Johnson, 90 Wn. App. 54, 950 P.2d 981 (1998).....26

State v. Mehrabian, 175 Wn. App. 678, 308 P.2d 660 (2013).....22

State v. Pate, 12 Wn. App. 237, 529 P.2d 875 (1974).....14, 15

State v. Thompson, 13 Wn. App. 526, 536 P.2d 683 (1975).....11

Washington State Constitution

Article 1, Section 326

Statutes and Rules

RCW 69.50.401(1)22

Washington State Pattern Jury Instructions

WPIC 5.01.....22

WPIC 50.60.....23

I. ASSIGNMENTS OF ERROR

1. The trial court erred in relying on information provided by a criminal informant, Lyle Long, to support probable cause that Mr. Watts engaged in any criminal activity because Mr. Long was unreliable and incredible; thus, such information is insufficient to pass the requisite *Aguilar-Spinelli* test and the State lacked probable cause absent that information.
2. Mr. Watts was denied his constitutional due process right to a fair trial when the court allowed the jury to hear testimony of the transaction on December 7, 2012; this testimony tainted the jury because this transaction in no way implicated Mr. Watts in any wrongdoing either directly or indirectly.
3. There was insufficient evidence to prove all the elements of the crime, beyond a reasonable doubt, when Lyle Long, the confidential informant, was the only individual to have witnessed Mr. Watts allegedly handle methamphetamine during the January 4, 2013 transaction; and Mr. Long was not “wired,” or have video or audio recording equipment on his person to document the transaction and the task force detectives had only binoculars to view the January 4, 2013 transaction.
4. Cumulative error violated Mr. Watts’s constitutional due process right to a fair trial.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in relying on information provided by a criminal informant, Lyle Long, to support probable cause that Mr. Watts engaged in any criminal activity when the record suggests that Mr. Long was unreliable and incredible; therefore, such information was likely insufficient to pass the requisite *Aguilar-Spinelli* test rendering an insufficiency in probable cause absent that information.

2. **Whether Mr. Watts was denied his constitutional due process right to a fair trial when the court allowed the jury to hear testimony of the transaction on December 7, 2012; this testimony tainted the jury because this transaction in no way implicated Mr. Watts in any wrongdoing either directly or indirectly**
3. **Whether there was insufficient evidence to prove all the elements of the crime, beyond a reasonable doubt, when Lyle Long, the confidential informant, was the only individual to have witnessed Mr. Watts allegedly handle methamphetamine during the January 4, 2013 transaction; and Mr. Long was not “wired,” or have video or audio recording equipment on his person to document the transaction and the task force detectives had only binoculars to view the January 4, 2013 transaction.**
4. **Whether cumulative error violated Mr. Watts’s constitutional due process right to fair trial.**

III. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

On February 27, 2013, Robert Gene Watts was charged with committing a violation of RCW 69.50.401(1), one count Delivery of a Controlled Substance (methamphetamine), based on allegations involving the defendant as a principle or accomplice on January 4, 2013. RP 4. On April 22, 2013, defense counsel made a stipulation and waiver of a 3.5 evidentiary hearing. RP 5. On December 3, 2013, in its first motion in limine, the State amended the information to add an enhancement that the commission of the offense took place within 1,000 feet of a school bus

stop designated by the school district. RP 5-6. On December 4, 2013, Mr. Watts was found guilty of the crime of Delivery of a Controlled Substance following a jury trial. RP 441. As to the special verdict for the enhancement to the information, the jury returned a verdict of guilty. RP 441.

2. FACTS

a. Charges

Robert Gene Watts was charged with committing a violation of RCW 69.50.401(1), one count Delivery of a Controlled Substance (methamphetamine), based on allegations involving the defendant as a principle or accomplice on January 4, 2013. RP 4. The State, on amended information, added an enhancement which alleged that the commission of the offense took place within 1,000 feet of a school bus stop designated by the school district. RP 5-6.

b. Substantive Facts

This case stems from a larger Organized Criminal Drug Enforcement Task Force (OCDET) operation involving the DEA, FBI, and Social Security Department which were investigating and targeting Christian Aquino Gonzales, also known as “Chino,” for distribution of controlled substances throughout Central and Eastern Washington. RP 59-60. In a joint effort with the OCDET, Detective Steve Brown, Detective

Brian Bowling, Agent Jeff Prock, and Agent Seth Thomas of the North Washington Narcotics Task Force (NWNTF), recruited Lyle Long to execute multiple controlled buys of narcotics from Lisa Mumm. RP 58. The purpose of these buys were to get Ms. Mumm to contact Chino thereby implicating him so as to “move up the chain from there.” RP 60. The facts particular to Mr. Watts’s appeal surround three separate transactions on December 7, 2012, January 4, 2013, and February 1, 2013.

On July 11, 2012, Lyle Long signed a “confidential informant” agreement with NWNTF after he was arrested on pill distribution and weapons charges. RP 54-57. Mr. Long has been convicted of multiple crimes of dishonesty including: (1) third degree theft when he took money from the NWNTF during the February 1, 2013 transaction at issue in this case; (2) making a false statement to task force officers during the same transaction; (3) first degree theft in 2006; (4) second degree possession of stolen property in 2005; and (5) third degree theft in 2003. RP 212-213. Despite these convictions, the NWNTF set up controlled buys of methamphetamine between Mr. Long and Ms. Mumm. RP 57. According to Det. Brown, Ms. Mumm was chosen as a target because she was a known drug dealer with suspected ties to Chino, she was a prior police informant, and “she knew where to get dope.” RP 57. In each controlled

buy, the NWNTF provided money to Mr. Long that was cataloged according to serial number. RP 147.

On December 7, 2012, under NWNTF supervision, Mr. Long made contact with Ms. Mumm to set up a “buy” at a house owned by Mr. Watts’s mother at the address 95 Old Riverside Highway. RP 58-61. At that time, Ms. Mumm was living at that residence and was Mr. Watts’s girlfriend. RP 75. At approximately 12:53 P.M., Mr. Long was driven by his wife to the residence at 95 Old Riverside Highway. RP 110. Upon arrival, Mr. Long went into the residence. RP 111. At approximately 1:34 P.M., NWNTF detectives observed a white Chevrolet Tahoe arrive at the residence. RP 111. Detectives then observed a blonde woman, later identified to be Ms. Mumm, exit the residence and make contact with an individual in the white Tahoe, later identified to be “Chino.” RP 111. Following that contact, Ms. Mumm reentered the residence. RP 112. At approximately 1:37 P.M., Mr. Long exited the residence, returned to his vehicle, and met with detectives. RP 112. Mr. Long then gave the detectives a plastic bag containing a crystalline substance that tested positive for methamphetamine. RP 112. Mr. Long also provided a statement of his observations. RP 113. According to Mr. Long’s testimony, he never made contact with Mr. Watts about this transaction, he never communicated with Mr. Watts at the residence, and Mr. Watts did

not physically exchange any methamphetamine for money on December 7, 2012. RP 215-216.

On the evening of January 4, 2013, according to Det. Brown was tasked with following "Chino." RP 64. Det. Brown followed Chino from one of Chino's "stash houses" in a trailer park on Highway 97 to the south side of Gene's Harvest Foods parking lot, arriving at 7:03 P.M. RP 67, 119. Det. Brown was located across the street in view of Chino. RP 67. During his pursuit of Chino, Det. Brown was in contact with the other task force detectives who informed him that Mr. Long had made contact with Ms. Mumm on the north side of the Gene's Harvest parking lot at 7:04 P.M. RP 68, 119. Over radio contact with other detectives, Det. Brown was informed that Ms. Mumm and Mr. Watts drove a blue Ford Explorer, registered to Mr. Watts, into the parking lot of Gene's Harvest. RP 68. Ms. Mumm exited the vehicle and entered the north entrance/exit of Gene's Harvest. RP 68. Det. Brown then observed Ms. Mumm exit the south entrance/exit and walk up to Chino's vehicle. RP 68. After Ms. Mumm made contact with Chino she reentered the store. RP 68. Chino subsequently left the parking lot at 7:09 P.M. and Det. Brown followed him. RP 69, 122. Det. Brown never saw Mr. Watts in person or the alleged transaction that occurred in the south parking lot of Gene's Harvest. RP 98.

According to Agent Seth Thomas, on the evening of January 4, he and Detective Brian Bowling were tasked with following Mr. Long to the transaction. RP 116. At 6:52 P.M., Mr. Long informed Agent Thomas that Ms. Mumm had instructed him to meet her at the north side of Gene's Harvest Foods. RP 116. Mr. Long pulled into the north parking lot of Gene's Harvest, and Agent Thomas observed Ms. Mumm exit the explorer and walk up to Mr. Long's vehicle. RP 118. After Ms. Mumm contacted Mr. Long, she proceeded to enter the store, exit through the back, and contacted Chino on the south side of the store. RP 118-19. After returning to the blue Ford Explorer, Agent Thomas was later informed that Ms. Mumm told Mr. Long to meet her in the south parking lot of Gene's Harvest. RP 121. At this point, Agent Thomas and Det. Bowling were out of view of the alleged transaction that occurred in the south parking lot of Gene's Harvest. RP 203. Mr. Long left the Gene's Harvest parking lot at 7:16 P.M. and met up with the task force detectives. RP 122. Mr. Long then gave detectives a plastic bag with a crystalline substance that tested positive for methamphetamine. RP 122. Mr. Long again provided a statement of his observations. RP 123. According to Mr. Long's testimony, Mr. Watts was driving the blue Ford Explorer and Ms. Mumm was seated in the passenger seat. RP 224. Mr. Long also testified that after

Ms. Mumm weighed out the drugs, she handed the bag to Mr. Watts who handed it to Mr. Long. RP 225.

However, according to Agent Thomas and Det. Bowling, they (1) did not have a clear view of what transpired in the south parking lot; (2) did not have surveillance equipment set up in their vehicle; (3) did not place a recording device on Mr. Long; and (4) only had binoculars to survey the transaction. RP 166-167. Agent Thomas also could not positively identify who was driving the Ford Explorer at the time of the transaction. RP 168. Det. Bowling testified that he did not see a hand to hand transaction in the Blue Explorer. RP 201-203. However, during trial and on redirect, Det. Bowling testified that he later recognized Mr. Watts as being in the Blue Explorer based on subsequent “multiple contacts with him.” RP 208-09.

On February 1, 2013, under NWNTF supervision, Mr. Long conducted his final transaction with Ms. Mumm. RP 71. The transaction began at the 95 Old Riverside Highway residence, moved to the trailer house of 29789 Highway 97, then south of “Riverside,” then into “Riverside,” then to 95 Old Riverside Highway, and finally ending on the corner of Bide-A-Wee and Old Riverside Highway. RP 71. According to Agent Thomas, who was riding with Det. Bowling, Mr. Long arrived at

Ms. Mumm's residence at 95 Old Riverside Highway at 3:48 P.M. RP 142. At 3:55 P.M., Mr. Long sent a text message to detectives that Ms. Mumm wanted to conduct the transaction in Riverside. RP 142. At 3:59 P.M., Agent Thomas and Det. Bowling observed "a female" exit the 95 Old Riverside Highway residence, make contact with a red Toyota pick-up, and then reentered the residence. RP 142. At 4:07 P.M., Agent Thomas and Det. Bowling began following a blue Ford Explorer after it left the residence and began travelling north on Old Riverside Highway. RP 142. At 4:10 P.M., the Ford Explorer pulled off to the side of the road forcing Agent Thomas and Det. Bowling to drive past it. RP 143. Agent Thomas testified that as he drove past, he identified Ms. Mumm driving the vehicle. RP 143.

Shortly thereafter, Det. Bowling observed the Ford Explorer come up in the rear-view mirror. RP 143. At 4:19 P.M., Det. Brown, who was following Chino at the time, informed Agent Thomas and Det. Bowling that the white Chevy Tahoe, Chino's vehicle, was meeting the Ford Explorer in the driveway of Chino's trailer house at 29789 Highway 97. RP 144. At 4:27 P.M., the Ford Explorer and the Chevy Tahoe left the trailer house. RP 144. At 4:40 P.M., Mr. Long informed Agent Thomas that Ms. Mumm contacted him and told him to meet at Bide-A-Wee Street and Old Riverside Highway to conduct the transaction. RP 145. Agent

Thomas and Det. Bowling did not follow Mr. Long to the transaction, rather they met up with him after it was completed. RP 145. After the transaction, Mr. Long informed the detectives that a woman named Melissa Starzyk, the roommate of Ms. Mumm and Mr. Watts, conducted the transaction. RP 146. According to Ms. Starzyk's testimony, on February 1, 2013, she delivered the methamphetamine to Mr. Long at the direction of Ms. Mumm. RP 297-298. Ms. Starzyk testified that she drove Mr. Watts's Ford Explorer to the transaction. RP 298. Ms. Starzyk also testified that she regularly used drugs. RP 310.

After the transaction was completed, Agent Thomas conducted a search of Mr. Long's person. RP 146. Agent Thomas's search of Mr. Long revealed a \$20 bill hidden inside the brim of his hat. RP 146. Mr. Long initially indicated that he had the \$20 bill in his hat prior to the transaction, however, after Agent Thomas told Mr. Long that all of the serial numbers of the money given to him for the transactions were recorded, Mr. Long immediately said, "No; that's your money." RP 147. Mr. Long was then arrested and charged with third degree theft and making a false statement to police officers. RP 147.

VI. ARGUMENTS

A. The trial court erred in relying on information provided by criminal informant, Lyle Long, to support probable cause

that Mr. Watts engaged in any criminal activity because Mr. Long was unreliable and incredible; thus, such information is insufficient to pass the requisite *Aguilar-Spinelli* test and the State lacked probable cause absent that information.

A defendant may challenge, on appeal, the sufficiency of a probable cause statement based on the information from a confidential informant, in that it does not satisfy the *Aguilar-Spinelli* test. *State v. Thompson*, 13 Wn. App. 526, 536 P.2d 683 (1975). Washington has adopted the *Aguilar-Spinelli* test, which consists of two prongs, to determine the sufficiency of an informant's tip or affidavit. *Id.* In order to satisfy the first, or "basis of knowledge" prong of the two-prong test, the affidavit must first contain information sufficient to establish the informant's trustworthiness based on the underlying circumstances and sources of his or her knowledge. *State v. Duncan*, 81 Wn. App. 70, 76, 912 P.2d 1090 (1996). Information showing the informant personally has seen the facts asserted and is passing on firsthand information satisfies the basis of knowledge prong. *Id.*

In order to satisfy the second, or "veracity" prong, the police must present the issuing magistrate with sufficient facts to determine either the informant's inherent *credibility* or *reliability*. *Id.* (Emphasis added). The veracity prong can be satisfied in two ways: (1) the informant's credibility may be established, or (2) if nothing is known about the informant, the

facts and circumstances surrounding the information may reasonably support an inference that the informant is telling the truth. *Id.* at 77, (citing *State v. Lair*, 95 Wn.2d 706, 709-10, 630 P.2d 427 (1981)). The most common way to satisfy the “veracity” prong is to evaluate the informant’s “track record”, or put another way, whether he or she has provided accurate information to the police in the past. *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984) (citing *State v. Woodall*, 100 Wn.2d 74, 76, 666 P.2d 364 (1983)). If the informant’s track record is inadequate, it may be possible to satisfy the veracity prong by showing that the accusation was a declaration against the informant’s penal interest. *Duncan*, 81 Wn. App. at 77.

If a police investigation reveals suspicious activity along the lines of the criminal behavior proposed by the informant, then the corroborating investigation may satisfy the requirements of *Aguilar–Spinelli*. *Id.* (citing *State v. Young*, 123 Wn.2d 173, 195, 867 P.2d 593 (1994)). The affidavit will be considered insufficient if it fails to meet *either prong* unless other police investigation corroborates the informant’s tip. *Duncan*, 81 Wn. App. at 76. (Emphasis added). The independent police investigations should point to suspicious activity, “*probative indications of criminal activity along the lines suggested by the informant.*” *State v. Jackson*, 102 Wn.2d at 438 (citing *United States v. Canieso*, 470 F.2d 1224, 1231 (2d

Cir. 1972)). (Emphasis in original). Merely verifying “innocuous details,” commonly known facts, or easily predictable events should not suffice to remedy a deficiency in either the basis of knowledge or veracity prong. *Jackson*, 102 Wn.2d at 438.

In this case, Mr. Watts concedes that the confidential informant’s information passes the first prong of the *Aguilar-Spinelli* test because Mr. Long asserted facts which he had witnessed firsthand; however, Mr. Watts assigns error to the sufficiency of probable cause insofar as Mr. Long was neither credible nor reliable in order to survive the veracity prong because (1) Mr. Long neither had a track record of assisting detectives as an informant nor did he make any declaration against his own penal interest in order to establish credibility; (2) Mr. Long had previously been convicted of multiple crimes of dishonesty and was charged with theft of the task force’s money following an informant transaction; and (3) assuming *arguendo* the attenuated criminal behavior proposed by Mr. Long may have revealed suspicious activity, there was no corroborating investigation to lend support or verity to Mr. Long’s claims.

First, Mr. Long neither had a track record of assisting law enforcement as an informant nor did he make any declaration against his penal interest to establish any credibility or reliability. Regarding any

previous track record, Mr. Long's reliability had not been established prior to recruitment as an informant for the NWNTF. Reliability has often been established by previously supplied accurate or helpful information to the agency in question. *State v. Pate*, 12 Wn. App. 237, 240, 529 P.2d 875 (1974). In *Pate*, the court held that an informant was reliable after the investigating officer contacted four different law enforcement agencies, all of which recommended the informant. *Id.* at 241. The *Pate* court suggested that reliability is not established if an investigating officer has no personal knowledge of the informant's prior undercover work, or if the informant never worked for the law enforcement agency of the officer; rather, more is needed. *Id.* at 240-42.

Here, the record suggests that Mr. Long neither previously supplied accurate or helpful information to the NWNTF nor did he previously work as an informant for the NWNTF or any other law enforcement agency. Although Det. Brown suggests that Mr. Long allegedly told him he could get "dope" from Ms. Mumm, this was not *supplying any new helpful information* independent to what was already known to the task force at that time. Det. Brown testified that he had known Ms. Mumm for "probably ten years," he had "bought ounces of cocaine out of her house [himself]," and he had previously arrested Ms. Mumm for selling drugs "on more than one occasion." RP 56-58. It is

axiomatic to infer that the task force knew that Ms. Mumm might be a dependable suspect to buy drugs from without any new information provided by Mr. Long. As such, Mr. Long had not previously supplied any helpful, new, or accurate information, unknown to the detectives in the task force at that time, nor had Mr. Long been recommended by any other agency, either of which might be used to establish his reliability. *See e.g., Pate*, 12 Wn. App. 237, 240-42.

Additionally, and as previously stated, the veracity of an informant may be shown if the informant makes a declaration against his or her own penal interest. *State v. Jackson*, 102 Wn.2d 432, 437, 688 P.2d 136 (1984). Here, no such declaration was made by Mr. Long. The NWNTF approached Mr. Long with a confidential informant agreement after Mr. Long was arrested for a separate and unrelated offense. RP 54-57. Mr. Long was approached and directed by the task force to assist in their investigation; therefore, Mr. Long's stake in the investigation was such that a declaration against his penal interest would have been inapplicable.

Second, Mr. Long's extensive record of crimes of dishonesty and his further charge of stealing from the task force just one month after the alleged January 2013 transaction had occurred, reveal that he was an unreliable and incredible informant, and his information does not pass the

second prong of the *Aguilar-Spinelli* test. In accepting the *Aguilar-Spinelli* test, the Washington State Supreme Court noted that an informant's furnishing of "reliable information in the past establishes general trustworthiness." *Jackson*, 102 Wn.2d at 437. Additionally, an informant may establish veracity by proving that he has provided *accurate information to police* in the past. *Id.* (Emphasis added). Contrastingly, in this case, the record not only fails to demonstrate that Mr. Long has provided "reliable information" to establish a "general trustworthiness," but he has been convicted of crimes revealing the opposite, such as third degree theft and making a false statement to task force officers, first degree theft in 2006, second degree possession of stolen property in 2005, and third degree theft in 2003. RP 212-213.

Moreover, and in contrast to the *Jackson* court's suggestion that an informant can prove veracity by a showing that he or she had provided accurate information to the police in the past, Mr. Long had effectively provided inaccurate information to the task force in this case when he lied about stealing twenty dollars after a transaction that had occurred within the same investigation and only a month after the transaction at issue. RP 73-74, 147, *see Jackson*, 102 Wn.2d at 437. It strains logic that an informant's information about a defendant may be considered reliable, absent any other corroboration, when that informant explicitly lies to the

task force assigned to investigate that defendant, and that same task force purports to solely rely on that information for purposes of inculcating the defendant. As such, the second prong of the *Aguilar-Spinelli* test has not been met because the informant in this case is unreliable and incredible based on his past criminal history of dishonesty and his explicit lies to the task force during the same investigation that he is being used as the sole informant for uncorroborated allegations about Mr. Watts.

Third, assuming *arguendo* that Mr. Long actually observed any suspicious activity on the part of Mr. Watts, the record is absent any facts suggesting that the detectives obtained further corroborating evidence of criminal activity required to establish veracity under the *Aguilar-Spinelli* test. *See e.g., State v. Young*, 123 Wn.2d 173, 867 P.2d 593 (1994) (concluding that an informant's tip as a basis for probable cause failed to meet the second prong of the *Aguilar-Spinelli* test when the only corroborating facts obtained by police did not necessarily indicate criminal activity).

a. State v. Duncan

For example, in *State v. Duncan*, the court found that the informant's affidavit in support of a search warrant did not satisfy the veracity prong of the *Aguilar-Spinelli* test, and that the subsequent

independent police investigation was insufficient. 81 Wn. App. 70, 77. 912 P.2d 1090 (1996). In that case, the defendant's girlfriend served as an informant by telling police that she had observed the defendant take numerous ounces of marijuana in and out of a storage unit the defendant had owned. *Id.* at 73. Based on that information, and information that the defendant had previously been arrested for growing a large quantity of marijuana, a search warrant for the storage unit was issued. *Id.* The trial found that the informant's information was incredible and uncorroborated and dismissed the case, and the appellate court affirmed. *Id.* at 73, 79.

In making such finding, the court determined that the affidavit in support of probable cause failed to explain the informant's credibility or reliability. *Id.* at 73. Additionally, there was an attempt by police to corroborate the informant's information by an independent investigation revealing facts that the defendant owned the storage unit and had visited it. *Id.* at 78. However, the court found such investigation insufficient and noted that such investigations should "point to *probative indications of criminal activity* along the lines suggested by the informant." *Id.* (Emphasis added) (internal quotations omitted).

Similar to the facts in *Duncan*, this case reveals that Mr. Long is the only person who purported to have observed suspicious activity

involving Mr. Watts. *See Id.* at 72-73. Mr. Long, similar to the defendant's girlfriend in *Duncan*, does not enjoy a successful track record of informant reliability and did not make any declarations against his penal interests.¹ Therefore, in order for Mr. Long's veracity to be established, his alleged observations must be corroborated by an independent police investigation that points to "probative indications of criminal activity," which are absent here. *Duncan*, 81 Wn. App. at 78. The only subsequent investigation of Mr. Watts, prior to being charged, was after the task force decided to no longer use Mr. Long as an informant, and Det. Brown followed Ms. Mumm to a residence where Mr. Watts was located. At that time, Mr. Watts *did not admit to buying or selling any drugs*. RP 75-77. (Emphasis added). Det. Brown merely said to Mr. Watts, "You sold one time [to Mr. Watts] and you sold three times [to Ms. Mumm]...So here's the deal. We either go to jail right now or you guys go to work. That's it. There's no other option." RP 76. At that point, Mr. Watts agreed to not go to jail and to work with Det. Brown, and Mr. Watts did not verify Det. Brown's claims.

¹ While Mr. Long was involved in a preceding transaction on December 7, 2012, this transaction did not result in any arrests or convictions, and Detective Brown testified that such transaction was merely "one part of a larger investigation." RP 62-63.

Additionally, and similar to *Duncan*, where the police had only the alleged observations of the defendant being involved in suspicious activity provided to them by the informant, the only information the detectives had pertaining to Mr. Watts was what Mr. Long, an incredible and unreliable informant, had given them. *Duncan*, 81 Wn. App. at 72-73. Det. Brown's questioning of Mr. Watts did not reveal any shape or form of "probative indications of criminal activity" requisite to support Mr. Long's allegations, and only the innocuous fact that Mr. Watts had driven a vehicle with Ms. Mumm inside were known. *See e.g., Duncan*, 81 Wn. App. at 78; *see also State v. Young*, 123 Wn.2d 173, 175, 867 P.2d 593 (1994) (concluding that innocuous facts are not sufficient to support police corroboration of an informant's affidavit when the defendant was charged with growing marijuana and the innocuous facts given by the informant where the home address of the defendant where the marijuana was suspected, that the home had an abnormally high electric bill, and that the basement windows were always covered). The detectives in this case could not corroborate any allegations that Mr. Watts possessed or transported, with intent to sell, any drugs because Mr. Long is the only source suggesting that Mr. Watts was at all involved.

Finally, not only was Mr. Long's observations uncorroborated, but Mr. Long was actually found to have stolen from the task force just one

month after he provided information about Mr. Watts to the task force, and he was ultimately charged with theft. RP 73-74, 147. Similar to the court in *Duncan*, this court should find that Mr. Long was an unreliable and incredible informant, his information does not meet the veracity prong of the *Aguilar-Spinelli* test, and reversal of the trial court's decision is proper.

B. Mr. Watts was denied his constitutional due process right to a fair trial when the court allowed the jury to hear testimony of the transaction on December 7, 2012; this testimony tainted the jury because this transaction in no way implicated Mr. Watts in wrongdoing either directly or indirectly.

A trial court's ruling on the admissibility of evidence is reviewed for abuse of discretion. *State v. Darden*, 145 Wn.2d 612, 619, 41 P.3d 1189 (2002); *State v. Powell*, 126 Wn.2d 244, 258, 893 P.2d 615 (1995). Abuse exists when the trial court's exercise of discretion is "manifestly unreasonable or based upon untenable grounds or reasons." *Powell*, 126 Wn.2d at 258. At issue here is the State's evidence about a transaction that occurred at Mr. Watts's house between Mr. Long and Ms. Mumm.

The evidence offered by the State implicating Mr. Long and Ms. Mumm in a drug transaction at Mr. Watts's house on December 7, 2012, was manifestly unreasonable and an abuse of the trial court's discretion. Nowhere in the record does any witness or evidence directly or indirectly implicate Mr. Watts in any wrongdoing on December 7, 2012. The State

put on a compelling case for the conviction of Chino and Ms. Mumm in reference to this transaction, but not Mr. Watts. The introduction of this testimony was manifestly unreasonable and materially misled the jury due to the State's attempt to paint the picture that because the transaction took place in or around Mr. Watts's home, he must have been involved in the delivery of methamphetamine. This testimony was not relevant, nor was it probative for the finding of guilty or not guilty of the crime Mr. Watts was accused of committing; the crime was not one of conspiracy – it was intent to deliver.

C. There was insufficient evidence to prove all the elements of the crime, beyond a reasonable doubt, when Lyle Long, the confidential informant, was the only individual to have witnessed Mr. Watts handle methamphetamine during the January 4, 2013 transaction; and Mr. Long was not “wired,” or have video or audio recording equipment on his person to document the transaction and the task force detectives had only binoculars to view the January 4, 2013 transaction.

Evidence is insufficient to support a verdict if the jury cannot find that each element of the offense was proven beyond a reasonable doubt. *State v. Green*, 94 Wn.2d, 216, 221-22, 616 P.2d 628 (1980). The State bears the burden of proving each element of the charged offense beyond a reasonable doubt. *Id.* A claim of insufficiency “admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom.” *State v. Mehrabian*, 175 Wn. App. 678, 699, 308 P.2d 660

(2013) (quoting *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992)). Circumstantial and direct evidence are equally reliable. WPIC 5.01 (2008). Under RCW 69.50.401(1), a person is guilty of delivery of a controlled substance, if each of the following elements are proved beyond a reasonable doubt: (1) That on or about (date), the defendant delivered a controlled substance; (2) That the defendant knew that the substance delivered was [*a controlled substance*] [(name of substance)]; and (3) this act occurred in the State of Washington. WPIC 50.06. At issue here is the first element, and the State cannot prove beyond a reasonable doubt that the Defendant on or about January 4, 2013, delivered methamphetamine.

First, the Defendant assigns error to the fact that Mr. Long is the only purported eye-witness to Mr. Watts allegedly “delivering methamphetamine” on January 4, 2013; and Mr. Long’s testimony is highly incredulous. As stated above, Mr. Long has *multiple* convictions for crimes of dishonesty in his criminal history. Considering the fact that Mr. Long was not properly vetted for reliability and veracity, his testimony should not have been admitted. The only testimony that the jury should have heard regarding the alleged drug transactions was that from law enforcement. Law enforcement never testified to being able to see Mr. Watts deliver methamphetamine in the parking lot. In sum, because Mr. Long should have never had his testimony heard in open court, in

conjunction with the fact that he was the only eye-witness to the alleged drug transaction on January 4, 2013, the State cannot prove beyond a reasonable doubt that Mr. Watts delivered methamphetamine in a dark parking lot on the night in question.

Second, the Defendant assigns error to the fact that law enforcement did nothing to verify Mr. Long's information by "wiring" him with audio or video surveillance equipment in light of the fact that the alleged transaction took place in the dark and no law enforcement officials could visually identify Mr. Watts allegedly deliver methamphetamine. Law enforcement did not have night vision surveillance technology or anything of the like to enhance their ability to view the alleged transaction except for binoculars. RP 166. Assuredly, binoculars would not be effective in the dark. By law enforcement's own admission, even though Mr. Long had allegedly worked on "multiple cases," and "proved to be reliable," law enforcement could not show specific information that would warrant permission to place a recording device on Mr. Long. RP 185. This apparent contradiction casts doubt on the reliability of Mr. Long and the accuracy of his narrative during the alleged delivery of methamphetamine.

The State's inability to prove beyond a reasonable doubt that Mr. Long delivered methamphetamine is further compounded by law

enforcement's failure to identify Mr. Watts in the parking lot of Gene's Harvest. Although the State put on a telling case involving multiple exchanges between Christian Aquino Gonzales, also known as "Chino," and Lisa Mumm, law enforcement could not sufficiently implicate Mr. Watts in delivering methamphetamine to Lyle Long on January 4, 2013. RP 97. Only after being so articulately led by the State prosecutor during redirect does Detective Brian Bowling, in his eight months of experience, say why he did not recognize the male he saw in the driver seat of the vehicle registered to Mr. Watts during cross-examination:

The State: And you said in response to the defendant's questions, his attorney's questions, -- you didn't recognize him at the time.

Officer Bowling: Correct.

The State: Were you able to -- to see the person well enough to -- to recognize who that person was?

Officer Bowling: Yes.

The State: And who was that?

Officer Bowling: It was Mr. Watts.

The State: And was that because you weren't familiar with Mr. Watts at the time he was driving at Gene's?

Officer Bowling: Right. I was (inaudible).

The State: And later you had multiple contacts with him?

Officer Bowling: Yes.

RP 208-09.

In sum, a series of indirect and illogical inferences must be made in order for a rational fact finder to conclude that Mr. Watts delivered methamphetamine, beyond a reasonable doubt, on January 4, 2013.

D. Cumulative error violated Mr. Watts's constitutional due process right to a fair trial.

Every criminal defendant has the constitutional due process right to a fair trial. *State v. Davenport*, 100 Wn.2d 757, 675 P.2d 1213 (1984); U.S. Const. Amend. V and XIV; Wash. Const. art 1, § 3. Under the cumulative error doctrine, a defendant is entitled a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. *State v. Coe*, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); *State v. Johnson*, 90 Wn. App. 54, 74, 950 P.2d 981 (1998). Even when some errors are not properly preserved for appeal, the court retains the discretion to examine them if their cumulative effect denied the defendant a fair trial. *State v. Alexander*, 64 Wn. App. 147, 150-51, 822 P.2d 1250 (1992).

In the case before the Court, the cumulative errors of the trial proceeding manifestly and unfairly violated Mr. Watts's constitutional due process right to a fair trial, which in turn affected the outcome of the trial. The errors that prejudicially affected the verdict are as follows: (1) given Lyle Long's unreliable and incredible propensities, the trial court's

confidence in the information he provided pertaining to Mr. Watts's criminal activity was in error; such information is insufficient to pass the requisite *Aguilar-Spinelli* test; therefore, the State lacks probable cause; (2) the trial court's allowance of the jury to hear testimony of the transaction on December 7, 2012, tainted the jurors' perception of Mr. Watts, which denied his constitutional due process right to a fair trial because there is no relevant evidence to implicate Mr. Watts of any wrong doing either directly or indirectly; (3) the evidence to show that Mr. Watts handled methamphetamine during the transaction on January 4, 2013, was insufficient to prove beyond a reasonable doubt given Mr. Long's lack of surveillance equipment on his person or otherwise and the task force detectives' inability to corroborate Mr. Long's account of the events particular to Mr. Watts's case; and (D) when viewed in the aggregate, the aforementioned trial court errors prejudicially violated Mr. Watts's constitutional due process right to a fair trial which resulted in a patently unfair outcome.

VII. CONCLUSION

For the reasons stated above, Robert Watts respectfully requests that the court reverse the trial court's decision.

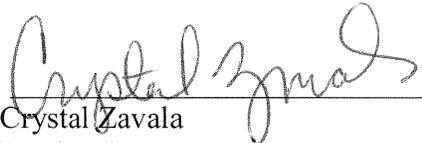
DATED this 25th day of August, 2014.



John R. Crowley, WSBA# 19868
The Crowley Law Firm, PLLC
216 1st Avenue S., Ste 204
Seattle, WA 98104
Attorney for Appellant

CERTIFICATE OF SERVICE

I declare under penalty of perjury that on August 25, 2014, I filed the original by United States Postal Service, postage paid, to the Court of Appeals-Division III, at 500 N. Cedar St. Spokane, WA 99201, I placed a copy of this document in the United States Postal Service Mail, postage paid, to Okanogan County Prosecuting Attorney's Office, Appellate Unit at 237 Fourth Avenue N. Okanogan, WA 98840 and a copy was mailed to Robert Watts, DOC# 371659, Airway Heights Corrections Center, 11919 W. Sprague Avenue, Post Office Box 1899, Airway Heights, WA 99001-1899.



Crystal Zavala
Paralegal
The Crowley Law Firm, PLLC
Grand Central Building
216 First Avenue, Suite 204
Seattle, WA 98104
Phone: (206) 623-7500
Fax: (206) 625-1223
Email: crystal@johncrowleylawyer.com