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NO. 64248-1-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

DANIEL J. COREY,

Appellant.

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BRIEF OF RESPONDENT

---

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## **I. ISSUES**

1. Has Appellant shown actual prejudice necessary to establish a manifest error affecting a constitutional right for the court to consider an issue raised for the first time on appeal?

2. Was the Confrontation Clause violated where the challenged statement was not hearsay as it was not offered for the truth of the matter, but was a explanation of the nature of the relevant law enforcement investigation?

3. Was the Right to a Jury Trial violated where the challenged statement was not an opinion regarding Appellant's guilt or veracity?

4. Was Appellant denied effective assistance of counsel?

## **II. STATEMENT OF THE CASE**

### **A. PRE-TRIAL STIPULATION.**

Prior to trial, defense stipulated to the admissibility of Defendant's statements made to the police during the investigation. RP 11-12.

### **B. TRIAL.**

Sometime during the night on September 11—12, 2008, a small motorcycle was stolen from Jerald Dunnagan's garage in Everett, WA. The motorcycle belonged to Dunnagan's eight year

old son, Tyler. The theft was not reported at the time because Jerald Dunnagan thought his wife Michelle was going to report the motorcycle stolen and Michelle thought Jerald was going to report it stolen. RP 22, 24.

On September 15, 2008, shortly before 1:00 pm, Snohomish County Sheriff's Deputy Geoghagan was patrolling the Everett area when he observed a man riding an off-road motorcycle proceed from the Wal-Mart parking lot on Evergreen Way onto 112<sup>th</sup> Street SW, heading westbound in the eastbound lane. The motorcycle had no lights and driver was not wearing a helmet. RP 30.

When the driver pulled into an apartment complex in the 1700 block of 112<sup>th</sup> Street SW, Deputy Geoghagan conducted a traffic stop. The driver, Robert Spillum, lived at the complex. The motorcycle was registered to Michelle Dunnagan, and had not been reported stolen. Spillum claimed that he was fixing the motorcycle for his friend, Daniel Corey. Deputy Geoghagan testified that people often drive other's vehicles and that off-road vehicles are often not registered. Since there was no indication that the motorcycle was stolen and Spillum lived at the complex, Deputy Geoghagan chose to give Spillum a warning. RP 30-32.

Later, on September 15, 2008, Deputy Geoghagan learned that the motorcycle had been stolen. Deputy Geoghagan confirmed with Jerald Dunnagan that his son's motorcycle had been stolen from the family garage during the night of September 11—12, 2008. RP 24-26, 33-34.

Deputy Geoghagan returned to the apartment complex and observed the motorcycle parked in the living room of Spillum's apartment. Finding no one at home, Deputy Geoghagan returned to his patrol car and began preparing a search warrant. He requested that another deputy respond to the location. Deputy Koster arrived and agreed to keep an eye on the apartment while Deputy Geoghagan continued working on the search warrant. RP 34-35.

While Deputy Geoghagan was working on the search warrant, Spillum, his girlfriend Ashley Vermaat, James Howell, and a second woman arrived at the apartment. Deputy Koster briefly detained Spillum while Deputy Geoghagan responded to the apartment. Deputy Geoghagan advised Spillum that he was in possession of a stolen motorcycle. Spillum gave consent for Deputy Geoghagan to retrieve the motorcycle and agreed to show Deputy Geoghagan where Daniel Corey lived. However, Spillum

took Deputy Geoghagan to an address that was not where Daniel Corey lived. Deputy Geoghagan later learned that Spillum and Corey were best friends. RP 35-36, 39.

Investigating on his own, Deputy Geoghagan managed to find where Corey lived and went there to interview him. Deputy Geoghagan asked Corey about the motorcycle; Corey denied knowing anything about the motorcycle. Deputy Geoghagan asked Corey about being at Spillum's apartment and Corey denied that also. RP 39-40. Deputy Geoghagan was asked what he did after Corey denied knowing about the motorcycle and denied being at Spillum's apartment, he responded:

Well, I had information from my interview of Mr. Spillum, my interview of Ashley, as well as the interview of Mr. Howell when I was originally at Spillum's residence recovering the motorcycle; they gave a physical description of Daniel Corey. The physical description that they gave me matched that of Mr. Corey, even down to the clothes that he was wearing at that time. I let him know about this information. I told him, Hey, look, there's people that said that you were at this apartment, that you were wearing these clothes, that they know who you are, and that you brought a motorcycle there.

RP 40.

Deputy Geoghagan stated that Corey then admitted that he had been at Spillum's apartment, but denied knowing anything about the motorcycle. RP 40-41.

Deputy Geoghagan was asked if he confronted Corey with the information again and he replied:

He told me that the motorcycle wasn't there; and then it's just reiterating what I had already known, is the motorcycle was there, people are saying you were there with it and that you were the one that brought it there, and then he gave me another admission.

RP 41.

Corey then admitted to Deputy Geoghagan that the motorcycle was at Spillum's apartment, but said that he did not bring it there. Corey said that four days earlier Corey had gotten off the bus near Honey's Strip Club on Highway 99. He went into the bushes to smoke some marijuana and that he located the motorcycle stashed in the bushes. Two days later he returned with Spillum. Spillum was driving a purple Honda. He showed Spillum where the motorcycle was. Spillum asked Corey to help him load the motorcycle into the back of the Honda, but he refused. RP 41-42.

Deputy Geoghagan testified that he used "a ruse",

telling [Corey] that there was video surveillance of him taking the motorcycle. One of his replies was that he gets extremely intoxicated and doesn't remember things, and then he denied taking the motorcycle and maintained that he found it in the bushes.

Corey terminated the interview at that time. RP 46.

Deputy Geoghagan again returned to Spillum's apartment. Spillum told him that the day before Spillum obtained the motorcycle, Corey asked Spillum for help retrieving some stolen BMX bicycles that were stashed the woods, but when they got there the bicycles were gone. The next day Corey borrowed his car and when Corey returned the motorcycle was in the trunk of his car. Spillum said that Corey would not have been able to lift the motorcycle by himself and put it in the car. RP 46, 53-54.

On cross examination, Deputy Geoghagan was asked if Spillum had given "a lot of different versions of what happened." Deputy Geoghagan replied that Spillum had told a few different version and initially denied "going down there." He stated that Spillum gave "maybe four or five" different versions. RP 55-56.

On cross, defense counsel elicited that Corey wrote two statements that were fairly consistent. Defense counsel then asked Deputy Geoghagan, "So [Corey] maintains what he said after the

ruse, right? He still denies what you're accusing him of?" RP 56-

58. The following transpired:

A. Well, after the ruse, one of the things that he said was that he gets heavily intoxicated.

Q. Okay.

A. And, in my experience, people try to deflect or-

MR. THOMPSON [defense counsel]: I'd object to the answer, your Honor; I don't believe that the witness is answering the question at this point.

MS. ROZZANO [prosecutor]: Your Honor, I think the witness should be allowed to fully answer the question. Counsel has asked him whether or not the answers had been consistent and asked regarding the ruse and his answers regarding the ruse. The sergeant should be allowed to fully answer that question.

THE COURT: Any response to that Mr. Thompson, before I rule?

MR. THOMPSON: Your Honor, I don't think I asked him anything about his experience.

THE COURT: Well, the question was:

*"So he maintains what he said after the ruse; right? He still denies what you're accusing him of?"*

I think that question allows a full answer. So go ahead; he can go ahead and talk about his experience. So your objection is overruled.

THE WITNESS [Geoghagan]: Well, when I told him about the ruse, he answered that he gets extremely intoxicated. And it's been my experience in the past that when people won't make a full-out admission to their knowledge of a particular event or of a crime, that they somehow try to come up with an alibi or some type of an excuse of not knowing, or it wasn't their fault because of something.

In this case, because he was extremely intoxicated, he couldn't remember what his actions were.

RP 58-59.

In his testimony Defendant admitted knowing the motorcycle was in the bushes and showing the motorcycle to Spillum. Defendant admitted he was with Spillum when the motorcycle was put in Spillum's car and taken to Spillum's apartment. RP 66-69.

Defendant was asked by defense counsel why he denied knowing anything about the motorcycle when questioned by Deputy Geoghagan. RP 72. Defendant testified:

Because I was spooked. I was afraid that something had happened to Rob with it or something. And my instant reaction was to put up a defense. I don't know what you don't know, you know what I mean. My first concern was something happened to my best friend.

Q. What do mean by that?

A. That's exactly what I mean by that. I don't know, did something – I didn't say nothing, but my first concern to me in my head was, did something bad happen to my best friend, because why is he here asking me about a motorcycle, that he's already thrown him under the bus, saying that he found Rob with a motorcycle. He says Robert says that I brought it over to his house. And then he starts the initiation of the rusing, because he was informed by Spillum with false information on what really happened, which led me to deny everything about what's going on, because if that's the case scenario, not only did he catch somebody with a motorcycle that apparently was stolen, but now he's trying to accuse me of being

involved in stealing a motorcycle that he already caught somebody on.

Q. So when you –

A. And I'm not trying to bend or bite my tongue, but I'm not trying to convict myself of something I didn't do, for sure, or convict my best friend of something he didn't do, either.

So it's the cop and robber, point the fingers and find out the bottom of the case scenario.

\* \* \*

Q. Mr. Corey, when he comes up and you deny what he is asking you, you weren't lying to him were you?

A. When I was denying?

Q. Yes.

A. I wasn't admitting.

Q. Were you trying to figure out what was going on, why they were there?

A. Yeah.

RP 72-73.

On cross examination the prosecutor asked Defendant:

Q. So when Sergeant Geoghagan came to you and said, Mr. Spillum indicates that you brought this bike over, and you said, I don't know anything about the motorcycle, I haven't been at his apartment --

A. I denied it.

Q. -- you denied it.

A. Uh-huh.

Q. Counsel asked you, were you lying when you said that. Was that true, that you didn't know anything about the motorcycle, and you hadn't been to his apartment?

A. It wasn't true.

Q. How about when he confronted you with the fact that people had seen you at the apartment, and you said, Well, I was at the apartment, but there was no motorcycle; was that part about there being no motorcycle true?

A. Apparently not, when I was with him and he unloaded the motorcycle from his car.

Q. When they said, They said you brought the motorcycle over, you said, Okay, I may have taken him to where the motorcycle was, but I didn't touch it—

A. I didn't touch it.

Q. -- was that true?

A. Yes.

RP 80-81.

Robert Spillum did not appear to testify at the start of the trial and the prosecutor informed the court that she would be seeking a material witness warrant if the case went into the next day. The court reserved ruling on the issue. RP 17.

During the presentation of the State's case the prosecutor learned that Spillum was having car trouble. The State rested subject to bringing a motion to reopen when Spillum appeared. Defense did not object. RP 62-63.

At the end of the defense case the prosecutor renewed the State's motion to reopen in the morning. Defense did not object and the court recessed for the day. RP 86.

The next morning Robert Spillum appeared for trial and the prosecutor moved to reopen the case. Defense responded that anything Spillum had to add at that point would be cumulative and asked the court to deny the State's motion to reopen and have Spillum testify. The court then denied the State's motion to reopen. RP 92-93.

Defendant was found guilty of taking a motor vehicle without permission following a jury trial. CP 34.

### **III. ARGUMENT**

#### **A. DEFENDANT HAS NOT SHOWN ACTUAL PREJUDICE TO ESTABLISH MANIFEST ERROR.**

Defendant raises two challenges for the first time on appeal. First, Defendant challenges the admission of out-of-court statements by Ashley Vermaat and James Howell. Defendant argues that the statements were hearsay and that the trial court violated Defendant's right to confront witnesses when it admitted the statements of Ashley Vermaat and James Howell through the testimony of Deputy Geoghagan. Defendant did not object to this testimony at trial.

Second, Defendant also raises for the first time on appeal that Deputy Geoghagan was allowed to express his opinion of Defendant's guilt. Defendant argues that Deputy Geoghagan's

testimony deprived Defendant of his right to a jury trial. Deputy Geoghagan began to testify about “his experience” when answering a question by Defense Counsel regarding whether Defendant had maintained his version of events following Deputy Geoghagan’s use of a “ruse.” At trial Defense Counsel objected that the witness was not answering the question. The trial court overruled the objection and allowed the witness to give a full answer. Deputy Geoghagan then completed his answer to the question and Defendant did not object to that testimony at trial.

“As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a ‘manifest error affecting a constitutional right’”. RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992); State v. Contreras, 92 Wn. App. 307, 311, 966 P.2d 915 (1998).

An appellant must show actual prejudice in order to establish that the error is “manifest.” Contreras, 92 Wn. App. at 311. “If the facts necessary to adjudicate the claimed error are not in the record

on appeal, no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333.

The rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party's failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.

Scott, 110 Wn.2d at 685.

Defendant's challenge squarely confronts these procedural barriers. Defendant did not object to the out-of-court statement at trial; nor did he raise an objection at trial that Deputy Geoghagan offered an opinion of Defendant's guilt.

#### **1. Adequacy Of Record.**

It is not enough for Defendant to allege prejudice; actual prejudice must appear in the record. McFarland, 127 Wn.2d at 334. To show that he was prejudiced by counsel's failure to object to the out-of-court statement, Defendant must show that the trial court would likely have sustained the objection if made. Id.

Because no objection was made, there exists no record of the trial court's determination of the issue in this case. Without an affirmative showing of actual prejudice, the asserted error is not

“manifest” and thus is not reviewable under RAP 2.5(a)(3).  
McFarland, 127 Wn.2d at 334.

**B. DEFENDANT’S RIGHT TO CONFRONTATION WAS NOT VIOLATED BECAUSE THE STATEMENT WAS NOT HEARSAY.**

Not surprisingly, Defendant seeks to avoid the consequences of his failure to comply with the settled procedural requirements by attempting to elevate his challenge into the constitutional realm. However, even a de novo review of the records (which would relieve Defendant of his burden to show the alleged error was manifest) does not reveal actual prejudice accruing to Defendant from the asserted constitutional error.  
McFarland, 127 Wn.2d at 334, fn 2.

**1. Statements Not Offered For The Truth Of The Matter Do Not Violate The Confrontation Clause.**

Crawford holds that the Confrontation Clause only applies to those statements that are offered for the truth of what they assert – i.e., those statements that are also hearsay.

One thing that is clear from Crawford is that the Clause has no role unless the challenged out-of-court statement is offered for the truth of the matter asserted in the statement. Crawford states: “The Clause ... does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.” And the only nontestimonial statements that it considers to be possible subjects of the Clause are “nontestimonial *hearsay*.” (to the extent Confrontation Clause covers

more than testimonial statements, its subject is hearsay.) In other words, the Clause restricts only statements meeting the traditional definition of hearsay.

U.S. v. Faulkner, 439 F.3d 1221, 1226 (10<sup>th</sup> Cir. 2006) *quoting* Crawford, 541 U.S. at 60, n. 9, 68, 124 S.Ct. at 1369, 1374.

Moreover, Washington Courts have squarely interpreted Crawford to exclude non-hearsay from Confrontation Clause claims: “[E]ven testimonial statements may be admitted if offered for purpose other than to prove the truth of the matter asserted.” State v. Davis, 154 Wn.2d 291, 301, 111 P.3d 844 (2005); State v. James, 138 Wn. App. 628, 641, 158 P.3d 102 (2007)(“This testimony does not appear to be presented for the truth of the matter asserted. The confrontation clause is not implicated.”) See *also* In Re Threders, 130 Wn. App. 422, 495, 123 P.3d 489 (2005):

The Crawford Court specifically retained the pre-existing rule ... “the Confrontation Clause ... does not bar the use of testimonial statements for the purposes other than establishing the truth of the matter asserted.” Crawford, 541 U.S. at 59 n. 9. There is no doubt that Washington decisions following Crawford recognize that “[w]hen out-of-court assertions are not introduced to prove the truth of the matter asserted, they are not hearsay and no confrontation clause concerns arise.”

Here, as detailed below, even a non-deferential review reveals the statement was properly admitted for other than the truth

of the matter – to explain the nature of Deputy Geoghagan's investigation.

**2. Admission Of Out-Of-Court Statements Does Not Violate The Confrontation Clause When Used To Explain The Nature Of An Investigation.**

Washington courts have recognized the use of non-hearsay to explain why police were conducting an investigation overcomes *Confrontation Clause* claims. State v. James, 138 Wn. App. 628, 641, 158 P.3d 102 (2007) (statement of unidentified female's hearing 'six of seven shots' to explain why police were conducting an investigation in a particular neighborhood did not violate Clause.)

Other jurisdictions have recognized the same quite recently:

In this case, Detective Rodriguez's testimony regarding the confidential informant's tip was not introduced to show that there actually was a marijuana hydroponic laboratory at the 159<sup>th</sup> Street house. Rather, Detective Rodriguez was simply explaining why he decided to investigate the 159<sup>th</sup> Street house. ... [B]ecause the confidential informant's statement was not hearsay, admission of that statement did not violate the Confrontation Clause.

U.S. v. Salom, 349 Fed. Appx. 409, 2009 WL 3297131, at 4 (11<sup>th</sup> Cir. 2009).<sup>1</sup>

[S]tatements that are not offered for the truth of the matter asserted may not be excluded under Crawford.

...

[Here,] the informants tip was made for the limited purpose of explaining why the government agent had reason for the stop, search and seizure of [defendant], not for the purpose of establishing a fact.

U.S. v. Holmes, 311 Fed. Appx. 156, 2009 WL 323246, at 8 (10<sup>th</sup> Cir. 2009)<sup>2</sup> citing Crawford v. Washington, 541 U.S. 36, 51, 124 S.Ct. 1354, 1364, 158 L.Ed.2d 177 (2004).

[T]he Confrontation Clause preference for a face to face confrontation at trial is to allow the jury to determine the witness credibility, possible bias, and ability to recall. ... These statements were introduced not for their truth, but to explain why the investigator began reviewing surveillance tapes and turned his attention to the cashier and customer couple later determined to be defendant and his girlfriend.

State v. Brunelle, 184 Vt. 589, 592, 958 A.2d 657, 663 (Vt. 2008).

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<sup>1</sup>Attached as 'Appendix A.' See 11th Cir. R. 36-2 ("Unpublished opinions are not considered binding precedent, but they may be cited as persuasive authority.").

<sup>2</sup> Attached as 'Appendix B.' See United States v. Lutz, 2008 WL 3864068, \*3 n. 3 (10th Cir.2008) ("while this unpublished opinion does not have precedential value, it has persuasive value with respect to the same material issue raised here").

In short, the out of court statement was admissible here because it was necessary to explain the nature of the investigation, and therefore, was not hearsay.

### **3. The Out-Of-Court Statement Was Admissible To Explain The Nature Of The Investigation.**

Deputy Geoghagan's statement regarding his interview of Robert Spillum, Ashley Vermaat and James Howell was made to explain his conduct during the investigation, not to assert the truth of statements made by Spillum, Vermaat or Howell.

Washington Courts recognize that an out-of-court statement may properly be admitted, not for the truth for the matter asserted, but to explain why an officer conducted an investigation.

When a statement is not offered for the truth of the matter asserted but is offered to show why an officer conducted an investigation, it is not hearsay and is admissible.

State v. Iverson, 126 Wn. App. 329, 337, 108 P.3d 799 (2005).

Out-of-court statements may also be admitted to explain how an investigation came to center on a defendant specifically. State v. Post, 59 Wn. App. 389, 394-95, 797 P.2d 1160 (1990).

The challenged statement [a telephone call from an individual who provided defendant's name] was not hearsay. It was not offered for the truth of what the caller said; rather, it is clear when viewed in context

that the testimony was offered to establish why the detective acted as he did.

Out-of-court statements have also been admitted to explain certain events and steps taken by the detective in the investigation of an already known crime. State v. Lillard, 122 Wn. App. 422, 437, 93 Wn. App. 969 (2004) (“The State did not offer [the informant/victims’] statements to prove what the cardholders had said, but to show how [the detective] conducted his investigation. The evidence was not hearsay.”)

The record shows that when Deputy Geoghagan initially contacted Spillum riding the motorcycle Spillum told Deputy Geoghagan that he was fixing the motorcycle for Daniel Corey. Deputy Geoghagan contacted Spillum again after he learned the motorcycle was stolen; Vermaat and Howell were present at that time. During the second contact Deputy Geoghagan was investigating the possession of stolen property and attempting to get a search warrant. Spillum offered to show Deputy Geoghagan where Daniel Corey lived, but took him to a wrong address. Further investigation by Deputy Geoghagan located an address for a Daniel Corey where Deputy Geoghagan contacted Defendant. Defendant initially denied any knowledge when asked about the motorcycle

and when asked about being at Spillum's apartment. Deputy Geoghagan testified that at that point he informed Defendant that he had information from Spillum, Vermaat and Howell, people who knew Defendant that identified Defendant as having been at Spillum's apartment with the motorcycle. Defendant then admitted having been at Spillum's apartment, but denied knowing anything about the motorcycle. Deputy Geoghagan again confronted Defendant with the information and Defendant then admitted that the motorcycle was at Spillum's apartment, but he denied having brought it there. RP 32, 36, 39-41. False information given to the police is considered admissible as evidence relevant to defendant's consciousness of guilt. State v. Clark, 143 Wn.2d 731, 765, 24 P.3d 1006 (2001); State v. Allen, 57 Wn. App. 134, 143, 787 P.2d 566, 788 P.2d 1084 (1990).

The statements of Spillum, Vermaat and Howell were made during Deputy Geoghagan's investigation of the then occurring crime of possession of stolen property. Had Defendant objected to the admission of the out-of-court statements of Spillum, Vermaat and Howell at trial the court would have admitted the statements to explain certain events and steps taken by Deputy Geoghagan in his investigation. Since Defendant had stipulated to the admissibility of

his statements made to the police during the investigation the trial court would also have admitted the statements to explain the context of Defendant's statements to Deputy Geoghagan. The statements were not hearsay.

Defendant has cited two opinions, in which the courts ruled an informant's statements to police were inadmissible hearsay. State v. Johnson, 61 Wn. App. 539, 811 P.2d 687 (1991), and State v. Aaron, 57 Wn. App. 277, 279-81, 787 P.2d 949 (1990). Those opinions, however, include different facts than the present case.

In Johnson and Aaron the defendants objected at trial to the admission of the out-of-court hearsay statement so that the reviewing courts had a record of the trial court's determination of the issue. Based on the record below, the courts in Johnson and Aaron found that the out-of-court statements were hearsay and admitting the statements violated the defendants' right of confrontation. Johnson, 61 Wn. App. at 547; Aaron, 57 Wn. App. at 283. Unlike the present case, in both Johnson and Aaron the court had a record to review.

To the contrary, in the present case the record was not developed on this issue because the objection was not made. Similarly, in State v. O'Hara, 141 Wn. App. 900, 174 P.3d 114

(2007) the defendant did not object at trial to the admission of the officers' testimony regarding statements by non-testifying witnesses. In O'Hara, the court upheld the admission of the officers' testimony finding it did not include hearsay and did not implicate the defendant's right of confrontation. O'Hara, 141 Wn. App. at 910-11.

#### **4. Defendant Waived His Right To Confrontation Regarding Spillum.**

Deputy Geoghagan's testimony regarding his interview of Robert Spillum, Ashley Vermaat and James Howell referred to statements that 1) identified Daniel Corey and 2) claimed Corey brought the motorcycle to Spillum's apartment. RP 40. The statements that identified Daniel Corey were made by all three. The separate statement that Corey brought the motorcycle to Spillum's apartment was made by Robert Spillum.

Defendant testified on direct examination that Deputy Geoghagan told him that Spillum said Defendant brought the motorcycle to Spillum's house. RP 72. On cross examination Defendant was asked:

Q. So when Sergeant Geoghagan came to you and said, Mr. Spillum indicates that you brought this bike over, and you said I don't know anything about the motorcycle, I haven't been at his apartment –

- A. I denied it.  
Q. -- you denied it.  
A. Uh-huh.

RP 80.

Defendant waived his right to confrontation regarding Spillum's statements identifying Defendant and that Defendant brought the motorcycle over to Spillum's apartment.

Waiver of a fundamental constitutional right must be made knowingly, voluntarily, and intelligently. State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). The defendant in Thomas did not testify. He argued on appeal that the trial court was obliged to advise him of his constitutional right to testify in his own behalf. Rejecting this argument, the Supreme Court held that it is the duty of defense counsel to advise the defendant of the right to testify, not the duty of the court. The court reasoned that trial judges should not be required to intervene in the attorney-client relationship to independently advise defendants of rights their attorney might advise waiving for tactical reasons. A trial judge "may assume a knowing waiver of the right from the defendant's conduct." Thomas, 128 Wn.2d at 559.

The Court's reasoning in Thomas controls here. The duty fell on defense counsel to instruct Defendant of his right to confront

all witnesses against him face-to-face. Defendant's choice to object to the prosecutor's motion to reopen and have Spillum testify was likely tactical, so as to not allow further incriminating evidence. RP 92. When the defense objected to having Spillum testify the court could assume a knowing waiver of the right to confront the witness through cross examination. The court was not obliged to obtain an express waiver from Defendant.

**C. DEFENDANT'S RIGHT TO A FAIR TRIAL WAS NOT VIOLATED BECAUSE THE TESTIMONY WAS NOT AN IMPROPER OPINION.**

**1. Deputy Geoghagan's Testimony Was Not An Improper Opinion.**

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant; such testimony is unfairly prejudicial to the defendant 'because it "invad[es] the exclusive province of the [jury]."' City of Seattle v. Heatley, 70 Wn. App. 573, 577, 854 P.2d 658 (1993) (citing State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987))". State v. Demery, 144 Wn.2d 753, 759, 30 P.2d 1278 (2001). This is true unless the defendant offers affirmative testimony raising the issue of credibility. State v. Kirkman, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). In the present case, Defendant offered affirmative testimony raising the issue of credibility. RP 72-73, 80-81.

Juries are presumed to have followed the trial court's instructions, absent evidence proving the contrary. Kirkman, 159 Wn.2d at 928, 155 P.3d 125 (*citing* State v. Davenport, 100 Wn.2d 757, 763, 675 P.2d 1213 (1984); State v. Cerny, 78 Wn.2d 845, 850, 480 P.2d 199 (1971), vacated on other grounds, 408 U.S. 939, 92 S.Ct. 2873, 33 L.Ed.2d 761 (1972)). In the present case, the jury was instructed: "You are to sole judges of the credibility of each witness. You are also the sole judges of the value or weight to be given to the testimony of each witness." CP 36.

In determine whether testimony constitutes an impermissible opinion on guilt or veracity, or a permissible opinion on an ultimate issue, a court should consider the totality of the circumstances, including (1) the type of witness, (2) the specific nature of the testimony, (3) the nature of the charges against the accused, (4) the type of defense, and (5) the other evidence before the trier of fact. Kirkman, 159 Wn.2d at 928, 155 P.3d 125; Demery, 144 Wn.2d at 759, 30 P.2d 1278.

The challenged testimony occurred during Defendant's cross-examination of Deputy Geoghagan. Counsel asked whether Defendant still denied what he was being accused of after Deputy Geoghagan's "ruse." Deputy Geoghagan answered that, based on

his experience, Defendant's statement that he gets extremely intoxicated and cannot remember his actions was an alibi, excuse for not knowing or a claim that it was not his fault. In short, Deputy Geoghagan agreed that Defendant continued to deny what he thought he was being accused of. This was in accord with Defendant's testimony that he denied knowing about the motorcycle and being at Spillum's apartment.

Deputy Geoghagan's testimony elicited by defense counsel did not express an opinion regarding Defendant's guilt or veracity.

## **2. Admission Of Deputy Geoghagan's Testimony Was Harmless Error Under The Overwhelming Untainted Evidence Test.**

Improper opinions on guilt invade the jury's province and thus violate the defendant's constitutional right to a jury trial. State v. Hudson, 150 Wn. App. 646, 656, 208 P.3d 1236 (2005); State v. Thach, 126 Wn. App. 279, 312, 106 P.3d 782 (2005); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011 (2003). The court applies the "overwhelming untainted evidence" test set forth in State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), to determine if the constitutional error was harmless. Thach, 126 Wn. App. at 312-13. The "overwhelming untainted evidence" test is met if the untainted evidence presented at trial is so overwhelming that

it necessarily leads to a finding of guilt. State v. Watt, 160 Wn.2d 626, 636, 160 P.3d 640 (2007); Hudson, 150 Wn. App. at 656. The question is whether the facts to be proved by the testimony are reasonably subject to dispute. Watt, 160 Wn.2d at 639.

In the present case, the untainted evidence satisfies the harmless error test. Defendant testified that he initially denied knowledge of the motorcycle and being at Spillum's apartment and that those statements were not true. Defendant testified that he later admitted knowing about the motorcycle, showing the motorcycle to Spillum, and being with Spillum when he took the motorcycle to his apartment. Here, even without the testimony elicited by defense counsel, overwhelming untainted evidence established that Defendant had changed his story and that Defendant was present when the motorcycle was taken to Spillum's apartment. Because overwhelming evidence established the facts contained in Deputy Geoghagan's testimony, the admission was harmless beyond a reasonable doubt. Watt, 160 Wn.2d at 647.

**D. DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL FOR FAILURE TO OBJECT TO THE ADMISSION OF STATEMENTS AT TRIAL.**

Defendant also claims ineffective assistance of counsel for failure to object to the out-of-court statements of Vermaat and

Howell at trial and failure to object that Deputy Geoghagan's testimony constituted an improper opinion of Defendant's guilt.

Effective assistance of counsel is guaranteed by both the federal and the state constitutions. In re Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005); see U.S. Constitution, amendment VI; Washington Constitution, Article I, § 22.

Competency of counsel is determined based upon the entire record below. McFarland, 127 Wn.2d at 335 (*citing* State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)(*citing* State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969))).

#### **1. Ineffective Assistance Of Counsel.**

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)(applying the 2-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d

674 (1984)). State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

If one of the two prongs of the test is absent, the court need not inquire further. Strickland, 466 U.S. at 697; State v. Foster, 140 Wn. App. 266, 273, 166 P.3d 726, review denied, 162 Wn.2d 1007, 175 P.3d 1094 (2007).

## **2. Counsel's Failure To Object Did Not Amount To Deficient Representation.**

Courts engage in a strong presumption counsel's representation was effective. McFarland, 127 Wn.2d at 335; State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); Thomas, 109 Wn.2d at 226. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. McFarland, 127 Wn.2d at 335; State v. Crane, 116 Wn.2d 315, 335, 804 P.2d 10, cert. denied, 501 U.S. 1237, 111 S.Ct. 2867, 115 L.Ed.2d 1033 (1991); State v. Blight, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

"The burden is on the defendant to show from the record a sufficient basis to rebut the 'strong presumption' that counsel's representation was effective." McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 226.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that the deficient performance prejudiced his trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); McFarland, 127 Wn.2d at 334-35.

The reasonableness inquiry presumes effective representation and requires the defendant to show the absence of legitimate strategic or tactical reasons for the challenged conduct. McFarland, 127 Wn.2d at 336.

The decision of when or whether to object is a classic example of trial tactics and only in "egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989)(failure to object deprives the trial court of an opportunity to prevent or cure the error).

Here, as discussed above, Deputy Geoghagan's testimony elicited by the State regarding the statements by Spillum, Vermatt and Howell that Defendant was at Spillum's apartment was not improper. These statements were admissible to explain the nature

of the investigation and the context of Defendant's statements. They were not offered for the truth of the matter asserted. The statements were not hearsay. Additionally, these statements were in accord with Defendant's own testimony. Thus, defense counsel had no basis for any objection to these remarks; Counsel's decision not to object was not objectively unreasonable.

Likewise, Deputy Geoghagan's testimony, elicited by defense counsel, did not express an opinion regarding Defendant's guilt. Counsel asked whether Defendant still denied what he was being accused of after Deputy Geoghagan's "ruse." Deputy Geoghagan answered that, based on his experience, Defendant's statement that he get extremely intoxicated and cannot remember his actions was an alibi, excuse for not knowing or a claim that it was not his fault. In short, Deputy Geoghagan agreed that Defendant denied what he was being accused of. Therefore, defense counsel had no basis for any objection to these remarks. The fact that a witness did not answer a question as counsel expected is not attributable to counsel's conduct. There was no deficient performance by counsel.

### **3. Defendant Has Not Shown Prejudice.**

The defendant also bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. McFarland, 127 Wn.2d at 337; Thomas, 109 Wn.2d at 225-26. To show prejudice, the defendant must show that but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998); In re Personal Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992).

As for the quoted portion of Deputy Geoghagan's testimony discussed above, there is no showing of prejudice. Defendant's own testimony supported the charge. Defendant admitted knowing the motorcycle was in the bushes and showing the motorcycle to Spillum. Defendant admitted he was with Spillum when the motorcycle was put in Spillum's car and taken to Spillum's apartment. Defendant admitted that it was not the truth when he denied knowing about the motorcycle and being at Spillum's apartment. RP 66-69, 80-81.

Defendant has not shown a reasonable probability that the outcome would have been different had counsel objected to Deputy

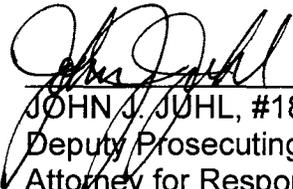
Geoghagan's testimony. Thus, the second prong of the ineffective assistance of counsel test has not been satisfied.

**IV. CONCLUSION**

For the foregoing reasons, defendant's appeal should be denied.

Respectfully submitted on June 17, 2010.

MARK K. ROE  
Snohomish County Prosecuting Attorney

By:   
\_\_\_\_\_  
JOHN J. JUHL, #18951  
Deputy Prosecuting Attorney  
Attorney for Respondent

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**H**

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Tenth Circuit Rule 32.1. (Find CTA10 Rule 32.1)

United States Court of Appeals,  
 Tenth Circuit.  
 UNITED STATES of America, Plaintiff-Appellee,  
 v.  
 David Lee HOLMES, II, Defendant-Appellant.  
 No. 07-3355.

Feb. 11, 2009.

**Background:** Defendant charged with possession with intent to distribute cocaine base moved to compel discovery regarding an informant, and to suppress evidence. The United States District Court for the District of Kansas, 487 F.Supp.2d 1206, denied the motions in part, and the defendant appealed.

**Holdings:** The Court of Appeals, Robert H. Henry, Circuit Judge, held that:

- (1) reasonable suspicion test for an investigatory stop was satisfied;
- (2) probable cause supported the searches and seizures of defendant's person and vehicle;
- (3) maintaining a confidential informant's anonymity did not deny drug defendant due process of law or violate his Sixth Amendment right to confront witnesses against him; and
- (4) evidence did not entitle defendant to a jury instruction on a necessity defense.

Affirmed.

West Headnotes

[1] Arrest 35 ⚔63.5(6)

35 Arrest

35II On Criminal Charges

35k63.5 Investigatory Stop or Stop- And-Frisk  
 35k63.5(6) k. Motor Vehicles, Stopping.

Most Cited Cases

Reasonable suspicion test for an investigatory stop was satisfied by informant's detailed description of drug defendant, including his attire, location, vehicle, and companion, together with the informant's in-person confirmation that the location, vehicle, and persons identified were those previously named and a police officer's surveillance, including the running of defendant's license plate. U.S.C.A. Const.Amend. 4.

[2] Arrest 35 ⚔63.5(5)

35 Arrest

35II On Criminal Charges

35k63.5 Investigatory Stop or Stop- And-Frisk  
 35k63.5(3) Grounds for Stop or Investiga-

tion

35k63.5(5) k. Particular Cases. Most Cited Cases

Controlled Substances 96H ⚔113

96H Controlled Substances

96HIV Searches and Seizures

96HIV(B) Search Without Warrant

96Hk110 Motor Vehicle Searches

96Hk113 k. Informants. Most Cited

Cases

Probable cause supported the searches and seizures of drug defendant's person and vehicle; the searching officer had a history with an informant who had provided detailed information regarding the defendant and made a subsequent in-person identification and confirmation of the defendant, prior to the stop, the officer surveyed the area and ran a check on defendant's vehicle, which revealed registration in the name of a known drug distributor, and the defend-

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ant made "furtive gestures" and refused the officer  
 initial request to raise his hands. U.S.C.A.  
 Const.Amend. 4.

**[3] Constitutional Law 92 ↪4594(4)**

92 Constitutional Law  
 92XXVII Due Process  
 92XXVII(H) Criminal Law  
 92XXVII(H)4 Proceedings and Trial  
 92k4592 Disclosure and Discovery  
 92k4594 Evidence  
 92k4594(2) Particular Items or  
 Information, Disclosure of  
 92k4594(4) k. Witnesses.  
 Most Cited Cases

**Criminal Law 110 ↪627.10(5)**

110 Criminal Law  
 110XX Trial  
 110XX(A) Preliminary Proceedings  
 110k627.10 Informers or Agents, Disclos-  
 ure  
 110k627.10(5) k. Informer Not a Wit-  
 ness to or Participant in Offense. Most Cited Cases  
 Maintaining a confidential informant's anonymity  
 did not deny drug defendant due process of law;  
 there was no indication that the informant was a  
 participant in the illegal transaction. U.S.C.A.  
 Const.Amend. 14; Fed.Rules Evid.Rule 501, 28  
 U.S.C.A.

**[4] Criminal Law 110 ↪627.10(3)**

110 Criminal Law  
 110XX Trial  
 110XX(A) Preliminary Proceedings  
 110k627.10 Informers or Agents, Disclos-  
 ure  
 110k627.10(2) Particular Cases  
 110k627.10(3) k. Drug and Narcot-  
 ic Offenses. Most Cited Cases

**Criminal Law 110 ↪662.5**

110 Criminal Law

110XX Trial  
 110XX(C) Reception of Evidence  
 110k662 Right of Accused to Confront  
 Witnesses  
 110k662.5 k. Informants, Failure to  
 Produce or Disclose. Most Cited Cases  
 Maintaining a confidential informant's anonymity  
 did not deny drug defendant his Sixth Amendment  
 right to confront witnesses against him; informant's  
 tip was made for the limited purpose of explaining  
 why a government agent had reason for the stop,  
 search and seizure of defendant, not for the purpose  
 of establishing a fact. U.S.C.A. Const.Amend. 6;  
 Fed.Rules Evid.Rule 801(c), 28 U.S.C.A.

**[5] Criminal Law 110 ↪814(8)**

110 Criminal Law  
 110XX Trial  
 110XX(G) Instructions: Necessity, Requis-  
 ites, and Sufficiency  
 110k814 Application of Instructions to Case  
 110k814(8) k. Matters of Defense in  
 General. Most Cited Cases  
 Evidence did not entitle a drug defendant to a jury  
 instruction on a necessity defense, despite his claim  
 that he offered to take cocaine from a convicted  
 murderer to avoid violence; defendant offered no  
 evidence to show that he had no legal alternative to  
 socially engaging with a felon convicted of murder,  
 inviting to chauffeur him, and offering to hold his  
 drugs.  
 \*157 James A. Brown, Office of United States At-  
 torney Topeka, Topeka, KS, for Plaintiff-Appellee.  
 Dwight L. Miller, Topeka, KS, for Defendant-App-  
 ellant.  
 Before HENRY, Chief Judge, ANDERSON, and  
 SEYMOUR, Circuit Judges.

**\*158 ORDER AND JUDGMENT<sup>FN\*</sup>**

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FN\* This order and judgment is not binding precedent except under the doctrines of law of the case, res judicata and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R.App. P. 32.1 and 10th Cir. R. 32.1.

ROBERT H. HENRY, Circuit Judge.

\*\*1 Defendant-Appellant David Lee Holmes, Jr., received a 121-month sentence for his conviction for possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1). On appeal, he challenges his conviction on three grounds. First, Mr. Holmes argues that the district court erred in denying his motion to suppress contraband because the police lacked a constitutional basis upon which to conduct the searches of and seizures from his person and vehicle. Applying *McCray v. Illinois*, 386 U.S. 300, 312-314, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967), which sets the standard under which an informant's tip may supply probable cause, we affirm the district court's determination.

Second, Mr. Holmes argues that the district court erred in denying his motion to compel discovery regarding the Government's confidential informant. Applying *United States v. Reardon*, 787 F.2d 512, 517 (10th Cir.1986) and *United States v. Mendoza-Salgado*, 964 F.2d 993, 1000-1001 (10th Cir.1992), which conclude that no disclosure is necessary for non-participant informants, we affirm the district court's determination.

Third and finally, Mr. Holmes argues that the district court erred in refusing to supply an instruction on the necessity defense to the jury. We hold that Mr. Holmes provided insufficient evidence for a jury to find this defense, which is "strictly and parsimoniously" given, and we affirm the district court's determination. See *United States v. Baker*, 508 F.3d 1321, 1325 (10th Cir.2007) (The general rule is the necessity defense is "strictly and parsimoniously applied.").

## I. BACKGROUND

On April 13, 2005, Topeka Police Department Officer Doug Garman received information from a confidential informant, who advised him that a black male, "David," possessed approximately one ounce of crack cocaine. The informant told Officer Garman that David (1) was wearing black clothing with a black ball cap that had red on it, (2) was driving a tan Chevy Caprice, and (3) had individually-packaged cocaine inside his pants. The informant disclosed the location of David's vehicle and the name of David's vehicle passenger, Andre Baker ("Dre-Dre").

Officer Garman characterized the informant's degree of reliability as extremely high. Prior to April 2005, Officer Garman and the confidential informant cooperated in four successful controlled purchases of drugs. In addition, the informant had previously provided information on seven other individuals involved in drug distribution in Topeka.

Based on the informant's tip, Officer Garman drove to a location identified by the informant, set up surveillance, and had the informant come to the scene to confirm the location as correct. The informant himself drove to the location and personally identified the residence; the vehicle's make, color, and location; Mr. Holmes, Mr. Holmes's clothing, and Mr. Holmes's companion, as those named previously. A records check of the vehicle identified by the informant revealed that the car was registered in the name of a known drug distributor.

\*\*2 When Mr. Holmes and Dre-Dre left in the identified vehicle, Officer Garman followed. Thereafter, Officer Garman called \*159 another police officer, Officer Youse, to conduct the traffic stop. Officer Youse stopped the car in a Taco Tico restaurant parking lot, and Officer Garman joined him there. Thereafter, Officer Garman approached the car and observed Mr. Holmes "immediately reach towards the right side of his waist." Aple's Br. at 3. Officer Garman commanded both Mr. Holmes and Dre-Dre to show their hands; neither complied.

Officer Garman drew his gun and repeated his com-

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mand, and this time, both obeyed. Following Officer Garman's orders, Mr. Holmes exited the car and was handcuffed. Officer Garman performed a pat-down of Mr. Holmes beginning with his waistband, which revealed a plastic bag of marijuana in his pockets.

Officer Garman then conducted a search of Mr. Holmes, finding two pieces of crack cocaine inside the brim of the hat he was wearing. Then, Officer Garman searched the vehicle and discovered more cocaine and a loaded pistol. *Id.*

On July 14, 2005, a grand jury indicted Mr. Holmes for possession of crack cocaine with intent to distribute. Mr. Holmes filed a motion to suppress the drugs found during a search of the vehicle, as well as incriminating statements he made after his arrest. He also filed a motion to compel discovery regarding the informant, which the district court denied. A jury convicted Mr. Holmes and the district court sentenced Mr. Holmes to 121 months' imprisonment. This appeal followed. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm.

## II. THE DISTRICT COURT DID NOT ERR BY DENYING MR. HOLMES'S MOTION TO SUPPRESS.

Mr. Holmes contends that the officers violated his Fourth Amendment rights by illegally stopping and searching him in the Taco Tico parking lot. The district court disagreed, finding that the facts and circumstances gave rise to reasonable suspicion sufficient to withstand Fourth Amendment scrutiny. Although we note that the district court's reliance on a "reasonable suspicion" rationale might be called into question, we affirm the district court's conclusion and uphold the constitutionality of the search and seizures.

As the United States Supreme Court instructed in *Ornelas v. United States*, appellate courts review determinations of reasonable suspicion and probable cause *de novo*. 517 U.S. 690, 691, 116 S.Ct.

1657, 134 L.Ed.2d 911 (1996). In so doing, the "reviewing court should take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.*

### A. *The Initial Justification for the Stop was Based on Reasonable Suspicion.*

[1] The district court held that the confidential informant's tip, along with the police officers' subsequent observations, gave rise to reasonable suspicion sufficient to justify the investigative detention and subsequent pat-down of Mr. Holmes's person and vehicle for weapons. Because the district court denied Mr. Holmes's motion on the basis that the police had reasonable suspicion to conduct an investigative stop, the district court did not reach the issue of probable cause. *See Terry v. Ohio*, 392 U.S. 1, 37, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) (upholding the stop of a person by law enforcement officers based upon "reasonable suspicion" that a person may have been engaged in criminal activ-ity).

\*\*3 In *Terry v. Ohio*, the Supreme Court affirmed the long-standing rule that, \*160 where police conduct is subject to the warrant requirement of the Fourth Amendment, a reviewing court must "ascertain whether 'probable cause' existed to justify the search and seizure which took place." 392 U.S. at 20, 88 S.Ct. 1868. The Court noted, however, that the probable cause standard does not control in all circumstances, specifically, that of swift police "action predicated upon the on-the-spot observations of the officer on the beat." *Id.* In the latter category of cases, a more flexible "reasonable suspicion" standard applies, which justifies police inquiry where specific and articulable facts exist that "taken together with rational inferences from those facts, reasonably warrant [an] intrusion." *Id.* at 21, 88 S.Ct. 1868. We agree that the informant's detailed description of Mr. Holmes, including his attire, location, vehicle, and companion; together

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with the informant's in-person confirmation that the location, vehicle, and persons identified were those previously named; and Officer Garman's surveillance, including the running of Mr. Holmes's license plate, more than satisfy *Terry's* reasonable suspicion test for an investigatory stop. Thus, we reject Mr. Holmes's challenge to the validity of the initial stop.

*B. The Search and Seizure Were Justified.*

[2] We turn next to Mr. Holmes's challenge to the searches and seizures of Mr. Holmes's person and vehicle. Based on the record, the district court concluded that Officer Garman not only had reasonable suspicion to conduct a *Terry* stop, but also had reasonable suspicion to handcuff Mr. Holmes, reach into Mr. Holmes's pocket to seize a plastic bag containing marijuana, and seize crack cocaine from the brim of Mr. Holmes's hat and pants, as well as a loaded firearm from a gym bag in the back seat of Mr. Holmes's car. Under *Minnesota v. Dickerson's* "plain view" doctrine, the district court concluded that the incriminating character of the plastic bag of marijuana was apparent; thus, Officer Garman's further inquiry was warranted. *See* 508 U.S. 366, 375, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993) (articulating the "plain view" doctrine).

Pursuant to the plain view doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. *Id.* However, as the *Dickerson* Court stated, "[if] police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object-*i.e.*, if its incriminating character [is not] immediately apparent-the plain-view doctrine cannot justify its seizure." *Id.* at 375, 113 S.Ct. 2130 (internal quotations and citations omitted). Under the "plain-feel" doctrine, a corollary to *Dickerson's* "plain-view" doctrine, an officer may seize contraband detected during a pat down where the officer knows the

nature of the item. *United States v. Thomson*, 354 F.3d 1197, 1200 (10th Cir.2003). According to the district court, a plain-feel analysis justifies Officer Garman's seizure of the marijuana in this case.

\*\*4 As an experienced police officer, Officer Garman may be uniquely qualified to distinguish between contraband and non-contraband items based on texture. Nevertheless, how it was immediately apparent that a small plastic bag, concealed within the fabric of Mr. Holmes's pants, contained marijuana and not anything from a range of other, non-contraband substances is unclear. Because we hold that Officer Garman had probable cause to conduct a search, we need not resolve the issue under *Dickerson*.

\*161 As the Supreme Court stated in *Illinois v. Gates*, probable cause exists when "there is a fair probability that contraband or evidence of a crime will be found in a particular place." 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983). The *Gates* Court adopted a "totality-of-the-circumstances approach" to the determination of probable cause, taking into account the "factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 230-31, 103 S.Ct. 2317. Inasmuch as probable cause is a "fluid concept-turning on the assessment of probabilities in particular factual contexts," so too do informants' tips "come in many shapes and sizes from many types of persons." *Id.* at 232, 103 S.Ct. 2317. When performing a probable cause inquiry involving a confidential informant, the informant's veracity, reliability, and basis of knowledge are "highly relevant." *Id.* at 230, 103 S.Ct. 2317. These factors are not mutually exclusive, however, and "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there is 'probable cause' to believe that contraband or evidence is located in a particular place." *Id.* (internal quotations omitted).

The Supreme Court has stated that a tip from a reliable informant, in conjunction with police corrobor-

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ation, is sufficient to establish probable cause to arrest. *McCray v. Illinois*, 386 U.S. 300, 304, 87 S.Ct. 1056, 18 L.Ed.2d 62 (1967); see also *Draper v. United States* 358 U.S. 307, 313, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959) (where an informant has been "accurate and reliable" in the past, and information provided is corroborated prior to defendant's arrest, there is probable cause for arrest, even if the officer's observation alone would not amount to probable cause). Although the confidential informant in *McCray* had been a source for five years (versus the matter of months here), the elements of *McCray's* probable cause test are met here. Officer Garman had a history with this informant; the informant had provided reliable information in the past; the informant provided detailed information regarding the defendant and made a subsequent in-person identification and confirmation of the defendant. Prior to the stop, Officer Garman surveyed the area and ran a check on Mr. Holmes's vehicle, which revealed registration in the name of a known drug distributor. Mr. Holmes made "furtive gestures" and refused Officer Garman's initial request to raise his hands. Rec. vol. 1, doc. 31, at 2-7. Because police possessed a constitutional basis-probable cause-upon which to perform the searches of and seizures from Mr. Holmes, we affirm the determination of the district court.

### III. THE DISTRICT COURT DID NOT ERR IN DENYING MR. HOLMES'S MOTION TO COMPEL DISCOVERY REGARDING THE GOVERNMENT'S INFORMANT.

A. *Maintaining the informant's anonymity did not deny Mr. Holmes due process of law.*

\*\*5 [3] Mr. Holmes next challenges the district court's denial of his motion to compel, contending that the investigatory stop was "based solely on the word of the informant," and "[t]he requested information about this person was critical for the court and counsel to make a determination as to his or her credibility." Aplt's Br. at 14. Specifically, he

contends that the absence of discovery denies him (1) due process and (2) his Sixth Amendment right to confront witnesses against him. Reviewing the district court's order denying Mr. Holmes's motion to compel discovery for abuse of discretion, \*162 *Soma Med. Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1299 (10th Cir.1999), we affirm.

Under the Rules of Evidence,

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Fed.R.Evid. 501.

In 1957, the United States Supreme Court abrogated the government's absolute nondisclosure privilege of a confidential informant's identity at common law and held that the informer's privilege is limited where the interest in the free flow of information is outweighed by an individual's right to prepare an effective defense. See *Roviaro v. United States*, 353 U.S. 53, 64, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957) (refusing to extend privilege to an informant's identity where the informant was "the sole participant, other than the accused, in the transaction charged," and thus was "the only witness in a position to amplify or contradict the testimony of government witnesses."). The *Roviaro* Court empowered trial courts to require disclosure where "the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of cause." *Id.* at 61, 77 S.Ct. 623. As the Court observed:

Most of the federal cases involving this limitation on the scope of the informer's privilege have arisen where the legality of a search without a war-

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rant is in issue and the communications of an informer are claimed to establish probable cause. In these cases the Government has been required to disclose the identity of the informant unless there was sufficient evidence apart from his confidential communication.

*Id.*

Since its decision in *Roviaro*, the Supreme Court has revisited the nondisclosure privilege. For example, in 1965, the Court held that the Sixth Amendment right of confrontation is obligatory on the states through the Fourteenth Amendment. *Pointer v. Texas*, 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965) (“[T]he right of an accused to be confronted with the witnesses against him must be determined by the same standards whether the right is denied in a federal or state proceeding....”).

\*\*6 While the district court must allow the disclosure of the informant's identity if the informant's testimony “might be relevant to the defendant's case and justice would best be served by disclosure,” *United States v. Reardon*, 787 F.2d 512, 517 (10th Cir.1986), we have consistently held that where the informer was not a participant in the illegal transaction, no disclosure is required. *United States v. Mendoza-Salgado*, 964 F.2d 993, 1000-01 (10th Cir.1992) (citing *United States v. Scafe*, 822 F.2d 928, 933 (10th Cir.1987); *United States v. Freeman*, 816 F.2d 558, 562 (10th Cir.1987); *Reardon*, 787 F.2d at 517). “[M]ere speculation about the usefulness of an informant's testimony” is not enough to require disclosure. *Scafe*, 822 F.2d at 933. The government is not required to supply information about an informer to a defendant when the informer merely provides the initial introduction. *Reardon*, 787 F.2d at 517.

Mr. Holmes has submitted no information indicating that the confidential informant was a participant in the illegal transaction. We see no error in the trial court's refusal to require disclosure of the informant in this case.

\*163 B. *Maintaining the government informant's anonymity did not violate Mr. Holmes's Sixth Amendment rights to confrontation.*

[4] According to Mr. Holmes, Officer Garman provided “lengthy testimony regarding the reliability of th[e confidential] informant” at motions hearings prior to trial. *Aplt's Br.* at 3. In addition,

Officer Garman testified the informant had personally observed Mr. Holmes in possession of the cocaine in question ... [and] that the informant told him the cocaine would be in Mr. Holmes' pants.... Officer Garman went on to testify that the informant described the car Mr. Holmes was driving ... Officer Garman went on to testify that he made contact with the confidential informant and requested that the informant go to an area where the informant would be able to re-identify the vehicle and confirm that the vehicle at question was the one that he had provided to Garman.

*Id.* at 3-4. Mr. Holmes argues that Officer Garman's statements regarding the informant's statements violated Mr. Holmes's Sixth Amendment rights, because:

[d]isclosure would have provided defense counsel an opportunity to interview the informant prior to the court deciding the motion to suppress, and to have access to his prior history and the agreement which existed between him and the government or law enforcement officers.... The accused also sought to discover the criminal record of the informant.... Similarly, defense counsel could have cross-examined the witness....

*Aplt's Br.* at 14.

As the Supreme Court observed in *Crawford v. Washington*, the Confrontation Clause applies to witnesses against the accused in other words, those who bear testimony. Testimony, in turn, is typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. 541 U.S. 36, 51, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (internal citation and quotation marks omit-

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ted). As a result, statements that are not offered to prove the truth of the matter asserted may not be excluded under *Crawford*. *Id.* at 59 n. 9, 124 S.Ct. 1354. Indeed, as we ruled in *United States v. Faulkner*, “the [Confrontation] Clause restricts only statements meeting the traditional definition of hearsay.” 439 F.3d 1221, 1226 (10th Cir.2006) (citing Fed.R.Evid. 801(c)).

\*\*7 Based on the record, the informant's tip was made for the limited purpose of explaining why a government agent had reason for the stop, search and seizure of Mr. Holmes, not for the purpose of establishing a fact. *See, e.g., United States v. Freeman*, 816 F.2d 558, 563 (10th Cir.1987) (stating that out of court statements are not hearsay when “offered for the limited purpose of explaining why a Government investigation was undertaken”). Testimony as to the truth of the matters asserted came from the testimony of Officer Garman.

In addition, we hold that Mr. Holmes's contention that he was unconstitutionally deprived of the right to confront such a witness because the state did not produce the informant to testify against him is “absolutely devoid of merit.” 386 U.S. at 312, 87 S.Ct. 1056 (citing *Cooper v. California*, 386 U.S. 58, 62 n. 2, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967)).

#### IV. THE DISTRICT COURT DID NOT ERR IN REFUSING TO SUPPLY AN INSTRUCTION FOR THE NECESSITY DEFENSE ON MR. HOLMES'S BEHALF.

[5] Third and finally, Mr. Holmes contends that his offer to take the cocaine \*164 from Dre-Dre so as to avoid violence constituted “necessity” sufficient to warrant an instruction regarding his “necessity defense” to the jury. More specifically, Mr. Holmes claims that he was afraid of Dre-Dre because Dre-Dre had a previous murder conviction. Mr. Holmes maintains that he offered to take the cocaine from Dre-Dre to avoid a shoot out with police. Based on these facts, Mr. Holmes believes he was entitled to a jury instruction on the “necessity defense,” and

thus the district court's refusal to submit a necessity instruction to the jury was error. *Apl't's Br.* at 19-20.

We review for abuse of discretion a district court's refusal to supply an instruction for the necessity defense and consider the instructions as a whole *de novo* to determine whether “they adequately apprise the jury of the issues and the governing law.” *United States v. Williams*, 403 F.3d 1188, 1195 n. 7 (10th Cir.2005). If the district court's failure to give the instruction was erroneous, “we must determine whether the conviction must be set aside because the error had a substantial influence on the outcome of the trial or leaves us in grave doubt as to its influence on the verdict. If the error is harmless the conviction will stand.” *United States v. Al-Rekabi*, 454 F.3d 1113, 1119 (10th Cir.2006) (internal quotation marks omitted).

A defendant is entitled to a theory-of-defense instruction if the defense theory is “supported by sufficient evidence for a jury to find in [the] defendant's favor.” *United States v. Grissom*, 44 F.3d 1507, 1512 (10th Cir.1995); *see also Al-Rekabi*, 454 F.3d at 1122 (holding that a defendant “must prove his claimed defenses by a preponderance of the evidence”). Mr. Holmes bears the burden to produce evidence of each element sufficient to warrant its consideration by the jury. *United States v. Bailey*, 444 U.S. 394, 415, 100 S.Ct. 624, 62 L.Ed.2d 575 (1980). The defense may be asserted “*only* by a defendant who was confronted with ... a crisis which did not permit a selection from among several solutions, some of which did not involve criminal acts.” *Al-Rekabi*, 454 F.3d at 1121 (internal quotation marks omitted) (emphasis supplied). District courts must “strictly and parsimoniously” apply the defense. *United States v. Baker*, 508 F.3d 1321, 1326 (10th Cir.2007) (internal quotation marks omitted).

\*\*8 In support of his necessity defense theory, Mr. Holmes cites an unpublished decision, *United States v. Benally*, which defines the necessity defense as warranted where: “(1) there is no legal alternative to violating the law, (2) the harm to be

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prevented is imminent, and (3) a direct, causal relationship is reasonably anticipated to exist between defendant's action and the avoidance of harm." Apt's Br. at 20 (citing *United States v. Benally*, 233 Fed.Appx. 864, 868 (10th Cir.2007) (internal quotation marks omitted)); *Al-Rekabi*, 454 F.3d at 1121 .

Our reading of *Benally*, and our Circuit precedent, however, undermine Mr. Holmes's defense. In *Benally*, the defendant sought a necessity defense on the charge of possessing a firearm, arguing that her possession stemmed from an attempt to avoid a fight on school grounds. In *Benally*, we refused to issue a necessity instruction where the defendant had knowledge of and access to a firearm when she entered a school zone, knew that the weapon was next to her in the vehicle, and could exercise dominion and control over the firearm. *Id.* at 870.

Assuming Mr. Holmes's version of the facts as true, Mr. Holmes similarly knew \*165 that his companion, Dre-Dre, possessed drugs, those drugs were next to him in the vehicle, and he had access to those drugs (as evidenced by his receipt upon "offering" to carry them).

"The purpose of requiring the defendant to show that he had no legal alternative to violating the law is to force an actor to evaluate the various options presented and choose the best one because in most cases, there will be a clear legal alternative." *Baker*, 508 F.3d at 1326 (internal quotation marks omitted). Indeed, as the Sixth Circuit noted in *United States v. Singleton*, "the keystone of the analysis is that the defendant must have no alternative-either before or during the event-to avoid violating the law." 902 F.2d 471, 473 (6th Cir.1990). Mr. Holmes has provided no evidence to show that he had no legal alternative to socially engaging with a felon convicted of murder (Dre-Dre), inviting to chauffeur him, and offering to hold his drugs.

## V. CONCLUSION

We therefore AFFIRM the district court's denial of Mr. Holmes's Motion to Suppress, AFFIRM the denial of Mr. Holmes's Motion to Compel, and AFFIRM the district court's refusal to issue an instruction on the necessity defense.

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**H**

This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Eleventh Circuit Rules 36-2, 36-3. (Find CTA11 Rule 36-2 and Find CTA11 Rule 36-3)

United States Court of Appeals,  
 Eleventh Circuit.

UNITED STATES of America, Plaintiff-Appellee,

v.

Guy SALOM, a.k.a. Roberto Falcon, Defendant-Appellant.

No. 08-10322

Non-Argument Calendar.

Oct. 15, 2009.

**Background:** Defendant was convicted in the United States District Court for the Southern District of Florida of conspiracy to possess with intent to distribute marijuana plants and conspiracy to maintain a drug-involved premises, among other offenses, and he appealed.

**Holdings:** The Court of Appeals held that:

- (1) evidence of defendant's mortgage fraud was admissible as other crimes evidence, and
- (2) evidence was sufficient to sustain convictions.

Affirmed.

West Headnotes

**[1] Criminal Law 110 ↪394.6(3)**

110 Criminal Law

110XVII Evidence

110XVII(I) Competency in General

110k394 Evidence Wrongfully Obtained

110k394.6 Motions Challenging Ad-

missibility of Evidence

110k394.6(3) k. Time for making motion. Most Cited Cases

In prosecution for conspiracy to possess with intent to distribute marijuana plants, among other offenses, district court did not abuse its discretion in denying defendant's motion to suppress evidence seized during search of his automobile and house as untimely; defendant did not file his motion until first day of trial, several days after court's deadline for filing motions in limine. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; Fed.Rules Cr.Proc.Rule 12(b)(3)(C), 18 U.S.C.A.

**[2] Criminal Law 110 ↪369.2(2)**

110 Criminal Law

110XVII Evidence

110XVII(F) Other Offenses

110k369 Other Offenses as Evidence of Offense Charged in General

110k369.2 Evidence Relevant to Offense, Also Relating to Other Offenses in General

110k369.2(2) Inseparable evidence and connected offenses; entire transaction. Most Cited Cases

Evidence that defendant committed mortgage fraud and appropriated electricity to conceal his use of powerful lamps to grow marijuana was admissible as other crimes evidence in prosecution for conspiracy to possess with intent to distribute marijuana plants and conspiracy to maintain a drug-involved premises, among other offenses; uncharged conduct arose out of same series of transactions as charged offenses, since it demonstrated how conspiracies were conducted. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; Fed.Rules Evid.Rule 404(b), 28 U.S.C.A.

**[3] Criminal Law 110 ↪419(3)**

110 Criminal Law

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#### 110XVII Evidence

##### 110XVII(N) Hearsay

##### 110k419 Hearsay in General

110k419(3) k. Evidence as to information acted on. Most Cited Cases  
 Detective's testimony concerning tip he received from confidential informant about marijuana growing operation at defendant's house was admissible in prosecution for conspiracy to possess with intent to distribute marijuana plants, notwithstanding contention that testimony was inadmissible hearsay; detective did not offer testimony to prove truth of informant's tip, but rather to explain why he decided to investigate defendant's house. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; Fed.Rules Evid.Rule 801(c), 28 U.S.C.A.

#### [4] Criminal Law 110 ⚡829(16)

#### 110 Criminal Law

##### 110XX Trial

##### 110XX(H) Instructions: Requests

##### 110k829 Instructions Already Given

110k829(16) k. Credibility of witnesses. Most Cited Cases  
 In prosecution for conspiracy to possess with intent to distribute marijuana plants, among other offenses, district court did not abuse its discretion in denying defendant's request for instruction that if jury found witness was lying about particular fact, it could infer opposite of witness's testimony, since court's instructions concerning witness credibility covered substance of defendant's proposed instruction. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846.

#### [5] Conspiracy 91 ⚡47(12)

#### 91 Conspiracy

##### 91II Criminal Responsibility

##### 91II(B) Prosecution

##### 91k44 Evidence

##### 91k47 Weight and Sufficiency

##### 91k47(3) Particular Conspiracies

##### 91k47(12) k. Narcotics and dan-

#### gerous drugs. Most Cited Cases

Evidence was sufficient to sustain convictions for conspiracy to possess with intent to distribute marijuana plants and conspiracy to maintain a drug-involved premises; police officers seized approximately 166 marijuana plants from defendant's house. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(b)(vii), 406, 21 U.S.C.A. §§ 841(b)(vii), 846.

\*410 Alvin E. Entin, Entin, Margules & Della Fera, P.A., Ft. Lauderdale, FL, for Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Florida. D.C. Docket No. 07-20470-CR-JEM.

Before BLACK, MARCUS and ANDERSON, Circuit Judges.

#### PER CURIAM:

\*\*1 Guy Salom, proceeding *pro se*, appeals his convictions for conspiracy to possess with intent to distribute at least 100 marijuana plants, and to maintain a drug-involved premises, 21 U.S.C. § 846, possession with intent to distribute at least 100 marijuana plants, 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(vii), and maintaining a drug-involved premises, 21 U.S.C. § 856(a)(1) and 18 U.S.C. § 2. Salom raises a number of issues on appeal: (1) the district court erred by denying his motion to suppress evidence; (2) the district court made various procedural and evidentiary errors during his trial; (3) the evidence presented at trial is insufficient to support the jury's finding that he possessed at least 100 marijuana plants; (4) the Government failed to provide him with certain potentially exculpatory evidence, as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); (5) his trial counsel provided him with ineffective assistance; and (6) the errors which he has identified had the cumulative effect of depriving him of his right to a fair trial. We address each issue in turn, and upon careful review we affirm Salom's convic-

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tions.

the district court did not abuse its discretion by denying Salom's motion as untimely.

#### \*411 I.

[1] On appeal, Salom argues the district court erred in denying his motion to suppress evidence seized during the officers' search of his van and a subsequent search of a house located at 14780 S.W. 159th Street in Miami (159th Street house).

In reviewing a district court's denial of a motion to suppress, we review the district court's factual findings for clear error and its application of the law to those facts *de novo*. *United States v. Mercer*, 541 F.3d 1070, 1073-74 (11th Cir.2008). When a district court denies a motion to suppress on the basis that it is untimely, however, we review only for an abuse of discretion. *United States v. Smith*, 918 F.2d 1501, 1509 (11th Cir.1990).

The Federal Rules of Criminal Procedure provide that a motion to suppress evidence must be made before trial. Fed.R.Crim.P. 12(b)(3)(C). In addition, a district court has discretion to set a deadline for the parties to file pretrial motions. Fed.R.Crim.P. 12(c). Any Rule 12(b)(3) defense that is not raised by a deadline set by the court under Rule 12(c) is waived, although the district court may grant relief from that waiver rule for good cause shown. Fed.R.Crim.P. 12(e); *see also United States v. Milian-Rodriguez*, 828 F.2d 679, 682-84 (11th Cir.1987) (holding the district court did not abuse its discretion by denying as untimely a motion filed after deadline set under Fed.R.Crim.P. 12(c)). This waiver rule applies even if the district court also addressed the merits of the untimely motion. *Milian-Rodriguez*, 828 F.2d at 683.

In this case, the district court informed the parties that all motions *in limine* needed to be filed no later than August 15, 2007. Salom's codefendant Echavarria did not file his motion to suppress until August 24, 2007, and Salom did not file his motion to adopt Echavarria's motion to suppress until August 27, the morning of the first day of trial. Therefore,

#### II.

\*\*2 Salom argues the district court made various procedural and evidentiary errors during his trial, which we address in turn.

##### A. Opening Statements

Salom argues the district court abused its discretion in limiting his defense counsel's opening statement. Salom also argues it was improper for the district court to remark that Fernando Quintana, a codefendant who later pled guilty and agreed to cooperate with the Government, had to "please" the court, as well as the prosecutor, to receive the benefit of a substantial assistance motion.

We review a district court's conduct during trial for an abuse of discretion. *United States v. Verbitskaya*, 406 F.3d 1324, 1337 (11th Cir.2005). As Chief Justice Burger explained, the purpose of an opening statement "is to state what evidence will be presented, to make it easier for the jurors to understand what is to follow, and to relate parts of the evidence and testimony to the whole; it is not an occasion for argument." *United States v. Dinitz*, 424 U.S. 600, 96 S.Ct. 1075, 1082, 47 L.Ed.2d 267 (1976) (Burger, J., concurring). The district court may "exclude irrelevant facts and stop argument if it occurs." *United States v. Zielie*, 734 F.2d 1447, 1455 (11th Cir.1984), *abrogated on other grounds by United States v. Chestang*, 849 F.2d 528, 531 (11th Cir.1988).

Generally, a trial judge must scrupulously avoid expressing any opinion on the merits of a case or on the weight of particular evidence. \*412 *United States v. Sorondo*, 845 F.2d 945, 949 (11th Cir.1988). "[I]n order to amount to reversible error, a judge's remarks must demonstrate such pervasive bias and unfairness that they prejudice one of the parties in the case." *Verbitskaya*, 406 F.3d at 1337

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(citation and quotation marks omitted).

In this case, the district court did not abuse its discretion in limiting defense counsel's opening statement because defense counsel was challenging the motives of the Government's main witness, Quintana, rather than simply explaining the evidence to the jury. Moreover, it does not appear that the district court's statement, "He has to please me, too," was intended as a comment on Quintana's credibility or on the merits of the defense's case. Also, it is unlikely that the court's brief remark, made at the beginning of trial, had any influence on the jury's verdict.

#### B. Rule 404(b) Evidence

[2] Next, Salom argues he was denied a fair trial due to the improper introduction of evidence that he committed other crimes. Moreover, he notes the Government did not provide notice that it was going to introduce this evidence, as required by Fed.R.Evid. 404(b).

Generally, we review a district court's evidentiary rulings for an abuse of discretion. *United States v. Edouard*, 485 F.3d 1324, 1343 (11th Cir.2007). Because Salom did not raise any Rule 404(b) objections during trial, however, we are reviewing this claim only for plain error. *Id.*

Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed.R.Evid. 404(b). However, such evidence is not extrinsic, and therefore is admissible, if it is: "(1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense." *Edouard*, 485 F.3d at 1344 (citation and quotation marks omitted).

\*\*3 In this case, Quintana's testimony concerning mortgage fraud he and Salom had committed when

Quintana purchased the 159th Street residence, and the theft of electricity to conceal the fact that they were using powerful lamps to grow marijuana, reflected uncharged conduct that arose out of the same series of transactions as the charged drug offenses because it showed how Quintana and Salom conducted their marijuana-growing conspiracy. In addition, Quintana's testimony concerning Salom's use of aliases was inextricably intertwined with the charged offenses because it showed that Salom tried to conceal his involvement with the 159th Street house by placing a false name on the lease. Because this evidence was intrinsic to the charges against Salom, the district court did not abuse its discretion by admitting it.

#### C. Limitations on Cross-Examination

Salom also asserts the district court improperly limited his cross-examination of Quintana.

Under the Confrontation Clause of the Sixth Amendment, a criminal defendant has the right to cross-examine a witness in order to show bias, prejudice, or ulterior motives for testifying. *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). The need for full cross-examination is particularly important "where the witness is the star government witness or participated in the crimes for which the defendant is being prosecuted." *United States v. Williams*, 526 F.3d 1312, 1319 (11th Cir.2008). Nevertheless, "trial \*413 judges retain wide latitude ... to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 1435, 89 L.Ed.2d 674 (1986). The test is "whether a reasonable jury would have received a significantly different impression of the witness' credibility had counsel pursued the proposed line of cross-examination." *Williams*, 526 F.3d at 1319 (citation and quotation marks omitted).

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In this case, Salom was allowed to cross-examine Quintana concerning his motives for testifying, and Quintana acknowledged he was hoping to receive a reduced sentence in exchange for his testimony. Therefore, the jury was aware that Quintana had a motive for giving testimony that was favorable to the Government. Any additional questions concerning whether Quintana was trying to avoid a sentencing enhancement based on his son's overdose would merely have reinforced that impression, and would not have given the jury a significantly different picture of Quintana's credibility. Therefore, the district court's decision to disallow that line of questioning did not violate the Confrontation Clause.

#### D. Hearsay/Confrontation Clause

[3] Next, Salom argues Detective Rodriguez's testimony concerning a tip he received from a confidential informant constituted inadmissible hearsay.

As noted above, we review a district court's evidentiary rulings for an abuse of discretion. *United States v. Baker*, 432 F.3d 1189, 1202 (11th Cir.2005). Generally, we review constitutional claims *de novo*. *United States v. Williams*, 527 F.3d 1235, 1239 (11th Cir.2008). However, because Salom did not offer a Confrontation Clause objection during trial, we review that claim for plain error only. See *United States v. Jiminez*, 564 F.3d 1280, 1286 (11th Cir.2009) (noting a hearsay objection does not preserve a Confrontation Clause issue for appellate review).

\*\*4 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). "Statements by out of court witnesses to law enforcement officials may be admitted as non-hearsay if they are relevant to explain the course of the officials' subsequent investigative actions, and the probative value of the evidence's non-hearsay purpose is not substantially outweighed by the danger of unfair

prejudice...." *Baker*, 432 F.3d at 1209 n. 17.

"[T]he Confrontation Clause of the Sixth Amendment prohibits the admission of out of court statements that are testimonial unless the declarant is unavailable and the defendant had a previous opportunity to cross-examine the declarant." *Jiminez*, 564 F.3d at 1286. "[T]he Confrontation Clause prohibits *only* statements that constitute impermissible hearsay." *Id.*

In this case, Detective Rodriguez's testimony regarding the confidential informant's tip was not introduced to show that there actually was a marijuana hydroponic laboratory at the 159th Street house. Rather, Detective Rodriguez was simply explaining why he decided to investigate the 159th Street house. In addition, this testimony did not result in any unfair prejudice to Salom because the confidential informant did not suggest that Salom was involved with the 159th Street house. Accordingly, the district court did not abuse its discretion by admitting the confidential informant's statement as non-hearsay. Finally, because the confidential informant's statement was not hearsay, admission of \*414 that statement did not violate the Confrontation Clause.

#### E. Improper Vouching

Next, Salom argues the prosecutor improperly vouched for the truthfulness of Detective Rodriguez's testimony by asking him on redirect examination whether he stood upon his oath, and whether he knew that he was under oath.

A claim of improper vouching by the prosecution presents a mixed question of law and fact that is subject to plenary review. *United States v. Eyster*, 948 F.2d 1196, 1206 (11th Cir.1991). Normally, a prosecutor may not personally vouch for the credibility of a witness. *Eyster*, 948 F.2d at 1206. The test for improper vouching is whether "the jury could reasonably believe that the prosecutor indicated a personal belief in the witness' credibility." *Id.* In

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applying that test, we consider whether the prosecutor: (1) “placed the prestige of the government behind the witness by making explicit assurances of the witness's credibility,” or (2) “implicitly vouched for the witness's credibility by implying that evidence not formally presented to the jury supports the witness's testimony.” *United States v. Castro*, 89 F.3d 1443, 1457 (11th Cir.1996).

In this case, the prosecutor's questions to Detective Rodriguez were intended to show that Detective Rodriguez continued to stand by his direct testimony, despite the fact that there were inconsistencies with his report. The prosecutor did not express a personal belief that Detective Rodriguez was telling the truth, nor did he suggest that there was evidence not presented to the jury that supported Detective Rodriguez's testimony. Thus, the prosecutor did not engage in any improper vouching.

#### F. Comment on Failure to Testify

**\*\*5** Next, Salom asserts the district court should have granted his motion for a mistrial based on the prosecutor's improper comments concerning Salom's decision not to testify at trial.

We review a district court's denial of a motion for a mistrial based on a prosecutor's statements during closing argument for abuse of discretion. *United States v. Knowles*, 66 F.3d 1146, 1163 (11th Cir.1995). “A prosecutor's statement violates the defendant's right to remain silent if either (1) the statement was *manifestly intended* to be a comment on the defendant's failure to testify; or (2) the statement was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.” *Id.* at 1162-63 (citation and quotation marks omitted). The prosecutor's remarks “must be examined in context, in order to evaluate the prosecutor's motive and to discern the impact of the statement.” *Id.* at 1163.

During closing arguments, the prosecutor noted that Quintana and Salom knew each other since 2004 or

2005 and acknowledged that Quintana was a convicted felon who had committed mortgage fraud. The prosecutor then stated,

Guess who his partner in the mortgage fraud was? Now, is that a big stretch to believe under all of this what they were doing on June 4th to go back in time, to go back in time, to go back in time to 2004, to 2005, when he's not saying he didn't know him. Nobody said specifically with reference to Mr. Salom-

After defense counsel objected and reserved a motion, the prosecutor continued: “There's no suggestion from Mr. Quintana's testimony that was found to be untrue. He was cross examined on that issue. He was cross-examined vigorously.”

**\*415** It is unclear whether pronoun “he” in the prosecutor's statement “he's not saying he didn't know him,” was meant to refer to Salom or Quintana. Moreover, it is not clear what the prosecutor meant by saying, “Nobody said specifically with reference to Mr. Salom,” because the prosecutor never completed that sentence. Given the ambiguity of the prosecutor's remarks, it does not appear that a jury would “necessarily and naturally” interpret those remarks as a comment on Salom's decision not to testify. Also, there is no indication that the prosecutor “manifestly intended” to comment on Salom's failure to testify. Accordingly, the district court did not abuse its discretion in denying Salom's motion for a mistrial.

#### G. Salom's Requested Jury Instruction

[4] Salom also asserts the district court erred by declining to issue his proposed jury instruction.

We review a district court's refusal to give a requested jury instruction for an abuse of discretion. *United States v. Fulford*, 267 F.3d 1241, 1245 (11th Cir.2001). A court's failure to give a requested jury instruction only constitutes reversible error if: “(1) the requested instruction correctly stated the law; (2) the actual charge to the jury did not substan-

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tially cover the proposed instruction; and (3) the failure to give the instruction substantially impaired the defendant's ability to present an effective defense." *Id.*

\*\*6 Here, Salom requested an instruction that, if the jury were to find that a witness was lying about a particular fact, then it could infer the opposite of that witness's testimony. Although Salom's proposed instruction was essentially a correct statement of the law, the district court's jury instructions concerning witness credibility covered the substance of Salom's proposed instruction. Moreover, the court's failure to give the requested instruction did not substantially impair Salom's defense, as he was still permitted to suggest to the jury during closing argument that they could believe the exact opposite of Quintana's testimony. Therefore, the district court did not abuse its discretion by denying Salom's proposed jury instruction.

### III.

Salom argues the evidence introduced at trial was not sufficient to support the jury's finding that he was responsible for at least 100 marijuana plants.

#### *A. Admissibility of the Photographs of the Drug Enforcement Administration ("DEA") Warehouse*

Salom asserts the photographs of the DEA warehouse were "false and misleading" because they showed plants that were taken from a different and completely separate grow house. He argues the photographs of the DEA warehouse should not have been admitted into evidence because they were irrelevant to his case.

A district court's evidentiary rulings are reviewed for a clear abuse of discretion and "[t]he district court has broad discretion to determine the relevance and admissibility of any given piece of evidence." *United States v. Merrill*, 513 F.3d 1293, 1301 (11th Cir.2008). Evidence is relevant if it has "any tendency to make the existence of any fact

that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401.

In this case, Special Agent Molina testified that the photographs of the DEA warehouse accurately depicted the manner in which the 159th Street plants were stored at the warehouse. This evidence was relevant because it suggested that the \*416 agents had, in fact, seized marijuana plants from the 159th Street house. Although Salom argues the plants depicted in the photographs actually came from a different grow house, it is the jury's role to choose between different constructions of the evidence, and Salom had an opportunity to cross-examine Agent Molina concerning the possible discrepancy. The district court did not abuse its discretion by admitting those photographs.

#### *B. Sufficiency of the Evidence*

[5] Salom also argues that, if the photographs of the warehouse had been properly excluded, the evidence introduced at trial would have been insufficient to support his convictions.

We review *de novo* whether there is sufficient evidence to support the jury's verdict in a criminal case. *United States v. Beckles*, 565 F.3d 832, 840 (11th Cir.2009). Evidence is sufficient to support a conviction where "a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt." *Id.* (citation and quotation marks omitted). We "view [ ] the evidence in the light most favorable to the government, and draw[ ] all reasonable factual inferences in favor of the jury's verdict." *Id.*

\*\*7 In this case, the applicable penalty statute for Counts One and Two, 21 U.S.C. § 841(b)(vii), establishes a mandatory minimum sentence of five years' imprisonment for offenses involving 100 or more marijuana plants. As this Court has previously explained, cuttings or seedlings do not count as marijuana plants unless there is "some readily ob-

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servable evidence of root formation.” *United States v. Foree*, 43 F.3d 1572, 1581 (11th Cir.1995) (citation and quotation marks omitted).

Salom's argument on appeal is that the law enforcement agents failed to inspect the marijuana plants for roots while the plants were still at the 159th Street house, and then inspected the wrong group of plants after they were transported to the DEA warehouse. However, Special Agent Molina testified she counted 166 plants while she was at the 159th Street house, she did not recount the plants after they were taken to the warehouse, and she later explained that she only counted those plants that had observable root systems. A jury could reasonably have concluded the plants inspected at the DEA warehouse were the same plants that were seized from the 159th Street house. Accordingly, we conclude the jury's finding that Salom possessed over 100 marijuana plants is supported by sufficient evidence.

#### IV.

Salom asserts the Government failed to disclose potentially exculpatory evidence, as required by *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

We review a defendant's *Brady* objection for plain error where the defendant failed to raise that objection in his motion for a new trial. *United States v. Lindsey*, 482 F.3d 1285, 1293 (11th Cir.2007). “[T]he Supreme Court has made it clear that the *Brady* rule is not an evidentiary rule that grants broad discovery powers to a defendant and that ‘[t]here is no general constitutional right to discovery in a criminal case.’ ” *United States v. Quinn*, 123 F.3d 1415, 1421 (11th Cir.1997) (quoting *Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977)). In order to prevail on a *Brady* claim, a defendant must establish: (1) the government possessed evidence favorable to him; (2) the defendant did not possess the evidence, nor could he have obtained it himself through reason-

able diligence; (3) the government suppressed the evidence; and (4) if the evidence had been revealed to the \*417 defense, there is a reasonable probability that the outcome of the proceedings would have been different. *United States v. Perez*, 473 F.3d 1147, 1150 (11th Cir.2006).

Salom has failed to identify any potentially exculpatory evidence that was improperly withheld by the Government. The record indicates the Government did provide defense counsel with the photographs taken at the 159th Street house and the DEA warehouse. Salom states in his reply brief his defense counsel was given a DVD with the photographs on it and Salom even introduced one of those photographs as a defense exhibit at trial. In addition, Salom describes in his reply brief what the recordings of Quintana's phone calls and personal visits will show, therefore, it appears Salom was able to independently obtain the information contained on those recordings. Finally, although the videotapes of Salom's conversations with his trial counsel might potentially be relevant to an ineffective assistance claim, it does not appear those videotapes would have had any impact on Salom's trial. Therefore, Salom has failed to establish any *Brady* error.

#### V.

\*\*8 Salom argues his trial counsel provided him with ineffective assistance by making a “unilateral concession of guilt” and by failing to subject the Government's case to any meaningful challenge.

Generally, we will not review a claim of ineffective assistance of counsel raised on direct appeal where the district court neither addressed that claim nor developed a factual record. *United States v. Bender*, 290 F.3d 1279, 1284 (11th Cir.2002); see also *Mas-saro v. United States*, 538 U.S. 500, 123 S.Ct. 1690, 1694, 155 L.Ed.2d 714 (2003) (noting that it is usually preferable to address ineffective assistance of counsel claims on collateral review rather than on direct appeal).

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In this case, the district court did not address the merits of Salom's ineffective assistance claim, nor did the court develop a factual record with respect to that claim. Therefore, Salom's ineffective assistance claim is not cognizable on direct appeal.

## VI.

Salom asserts that, even if the individual errors he has identified are not sufficient to merit reversal, the cumulative effect of these errors deprived him of his right to a fair trial.

We have held that “the cumulative effect of multiple errors may so prejudice a defendant's right to a fair trial that a new trial is required, even if the errors considered individually are non-reversible.” *United States v. Khanani*, 502 F.3d 1281, 1295 (11th Cir.2007) (citation and quotation marks omitted).

As described above, Salom has not shown that the district court committed any errors. Therefore, he also cannot establish any cumulative error.

Accordingly, for the above-stated reasons, we affirm Salom's convictions.

**AFFIRMED.**

C.A.11 (Fla.),2009.  
U.S. v. Salom  
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KW



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June 17, 2010

Richard D. Johnson, Court Administrator/Clerk  
The Court of Appeals - Division I  
One Union Square  
600 University Street  
Seattle, WA 98101-4170

**Re: STATE v. DANIEL J. COREY  
COURT OF APPEALS NO. 64248-1-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

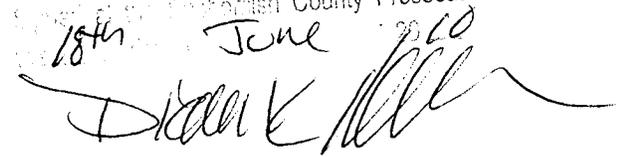


JOHN J. JUHL, #18951  
Deputy Prosecuting Attorney

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STATE OF WASHINGTON  
2010 JUN 21 AM 11:08

cc: Nielsen, Broman & Koch  
Attorneys for Appellant

I have enclosed a properly stamped envelope  
sent to the attorney for the defendant that  
contains a copy of this document.  
I declare under penalty of perjury under the laws of the  
State of Washington that this is true.  
18th June 2010  
Deputy Prosecuting Attorney's Office



Administration  
Bob Lenz, Operations Manager  
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(425) 388-3333  
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W

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COURT OF APPEALS DIV. I  
STATE OF WASHINGTON

2010 JUN 21 AM 11:07

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

THE STATE OF WASHINGTON,

Respondent,

v.

DANIEL J. COREY,

Appellant.

No. 64248-1-I

AFFIDAVIT OF MAILING

AFFIDAVIT BY CERTIFICATION:

The undersigned certifies that on the 18<sup>th</sup> day of June, 2010, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope directed to:

THE COURT OF APPEALS - DIVISION I  
ONE UNION SQUARE BUILDING  
600 UNIVERSITY STREET  
SEATTLE, WA 98101-4170

NIELSEN, BROMAN & KOCH  
1908 EAST MADISON STREET  
SEATTLE, WA 98122

containing an original and one copy to the Court of Appeals, and one copy to the attorney for the appellant of the following documents in the above-referenced cause:

BRIEF OF RESPONDENT

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office this 18<sup>th</sup> day of June, 2010.

A handwritten signature in black ink, appearing to read 'Diane K. Kremenich', written over a horizontal line.

DIANE K. KREMENICH  
Legal Assistant/Appeals Unit