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NO. 68475-2-I

**IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON
Respondent,

v.

RAYMOND MAK,
Appellant.

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**ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY**

The Honorable Susan K. Cook, Judge

RESPONDENT'S BRIEF

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I. SUMMARY OF ARGUMENT

Raymond Mak was convicted of possession with intent to manufacture or deliver a controlled substance, conspiracy to deliver a controlled substance and maintaining a vehicle for drug trafficking after he purchased two kilograms of cocaine from an undercover officer.

Mak contends possession with intent to manufacture or deliver is an alternative means crime and there was insufficient evidence of possession with intent to manufacture or deliver. Possession with intent to manufacture or deliver is not an alternative means offense as both manufacture and delivery address the same subject. In addition, given the cost and purity of the kilogram of cocaine purchased, and the expert testimony of the officers about the purpose of purchasing that amount, there was sufficient evidence for a jury to conclude there was the intent to process or package the cocaine.

Mak also contends evidence was insufficient to show he maintained the vehicle for drug trafficking. However, Mak actually put the kilograms purchased into his vehicle where it was located by officers, and Mak had arranged for the future kilograms from the undercover officer, showing his vehicle to the dealer while cutting out the middleman. This is sufficient evidence to show his vehicle was kept for drug trafficking.

The appeal must be denied and the convictions affirmed.

II. ISSUES

1. Is possession with intent to manufacture or deliver a controlled substance a crime with alternative means of manufacture or delivery?
2. Where two kilograms of pure cocaine is purchased for \$42,000, and expert testimony is presented that the drug is purchased to be processed and repackaged to make money, was there sufficient evidence to support a jury finding the drugs were possessed with intent to manufacture?
3. Where two kilograms of cocaine are placed in a vehicle to be driven from the scene of a drug delivery by a person who has asked the undercover officer to engage in future drug deals, was there sufficient evidence the vehicle was kept to hold drugs?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On May 24, 2011, Raymond Mak was charged with Possession with Intent to Manufacture or Deliver Cocaine, Conspiracy to Deliver a Controlled Substance, and Maintaining a Vehicle for Drug Trafficking all alleged to have occurred on May 20, 2011. CP 1-3. The State provided a

notice of intent to seek an exceptional sentence based upon the major violation of the uniform controlled substances act. CP 1-3.

Jeffrey Huynh arranged with an undercover police officer to buy drugs. CP 6. The deal was discussed at a Mount Vernon restaurant with Mak and Huynh present. CP 6-7. After exchanging the money, the undercover officer gave two kilograms of cocaine and smaller bag of cocaine to Mak. CP 7. Mak concealed the cocaine in the trunk of his vehicle. CP 7. Officers stopped the vehicle a short distance away. CP 7. Mak and Huynh were arrested. CP 7. Mak stated he thought selling narcotics would be an easy way for him to make money. CP 7. A search warrant executed on the vehicle revealed the bag with cocaine, the jacket used to conceal the money, and numerous cell phones. CP 8.

On January 17, 2012, the State amended the information to clarify the number of participants involved in the conspiracy to deliver. CP 11.

On January 23, 2012, the case went to trial. 1/24/12 RP 3.¹

¹ The State will refer to the verbatim report of proceedings by using the date followed by "RP" and the page number. The report of proceedings in this case are as follows:

8/16/11 RP	3.5 Hearing
1/23/12 RP	Trial Day 1 (in volume with second day of trial)
1/24/12 RP	Trial Day 2 (in volume with first day of trial)
1/25/12 RP	Trial Day 3
1/26/12 RP	Trial Day 4
1/27/12 RP	Trial Day 5
2/10/12 RP	Sentencing.

On January 27, 2012, the jury returned verdicts finding Mak guilty of Possession with Intent to Manufacture or Deliver Cocaine, Conspiracy to Deliver a Controlled Substance, and Maintaining a Vehicle for Drug Trafficking. CP 53-55.

The jury also returned special verdicts finding that the Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance were major violations of the uniform controlled substances act. CP 57, 58.

On February 10, 2012, the trial court sentenced Mak to an exceptional sentence of 96 months of prison time on Possession with Intent to Manufacture or Deliver Cocaine and Conspiracy to Deliver a Controlled Substance and a standard range sentence of 20 months on Maintaining a Vehicle for Drug Trafficking. CP 62-3.

On February 27, 2012, Mak timely filed a notice of appeal. CP 89-90.

2. Statement of Facts

i. Summary of Trial Testimony²

Seim Delacruz is an agent with border patrol who was working as an undercover officer with the Skagit County Interlocal Drug Enforcement Task

² Given the defense claim of sufficiency of the evidence, the State presents a detailed summary of the trial testimony.

Force in 2011. 1/24/12 RP 57, 59. Agent Delacruz worked trying to dismantle drug trafficking organizations by acting as a mid-level dealer. 1/24/12 RP 61.

Delacruz became aware of a person named Jeff who wanted to purchase kilograms of cocaine. 1/24/12 RP 61. Jeff wanted to broker a deal in Skagit County as it is a hub for dealing. 1/24/12 RP 62. Delacruz was used given his Hispanic descent. 1/24/12 RP 62.

On January 26, 2011, Delacruz spoke with Jeff by phone and represented he was a kilo-level dealer. 1/24/12 RP 62. Delacruz sent Jeff a photograph of drugs. 1/24/12 RP 64. To gain Jeff's confidence, Delacruz had a number of conversations with Jeff until May 20, 2011. 1/24/12 RP 65. Delacruz met with Jeff on February 10, 2012, at a restaurant in Mount Vernon to provide samples. 1/24/12 RP 67, 68. Officers put two kilograms of drugs which had been seized from the border in the back of a car to show to Huynh. 1/24/12 RP 72-3, 92. Jeff said he was coming from Portland and was bringing the person who was actually going to purchase the drugs. 1/24/12 RP 68, 75. Delacruz identified the co-defendant Jeffrey Huynh in court as the person he met with. 1/24/12 RP 67. Officers never identified the other person at that meeting. 1/24/12 RP 91. Delacruz met Huynh outside, and they went inside the restaurant. 1/24/12 RP 75. Delacruz was talking mostly with Huynh, but the other person was sitting across from

Delacruz, looking at Delacruz and not saying anything. 1/24/12 RP 76. Huynh asked to see the cocaine. 1/24/12 RP 76. Delacruz asked another officer to bring the drugs by. 1/24/12 RP 76. Huynh and the other man had a conversation in their native Asian language, which Delacruz could not understand. 1/24/12 RP 86, 107. Huynh and Delacruz went outside. 1/24/12 RP 77. Huynh and Delacruz got inside a vehicle and Huynh was shown the two packages of drugs. 1/24/12 RP 77. Huynh took pictures and they spoke about the quality of the cocaine. 1/24/12 RP 77. After they returned inside, Huynh and the other man spoke again, and they told Delacruz they would decide about the purchase in a couple of days. 1/24/12 RP 79-80. After the call, Delacruz complained to Huynh about the way the other person conducted himself during the meeting. 1/24/12 RP 110.

Over the next few months, Delacruz and Huynh had conversations about the drugs about twenty to thirty times and they arranged on prices. 1/24/12 RP 81, 102, 1/25/12 RP 108. Huynh appeared to be working for three different buyers. 1/25/12 RP 150. Huynh wanted a broker's fee as part of the price. 1/24/12 RP 81-2. The drugs they were talking about dealing were of a quality to be cut before being sold to others who would then use or re-sell the drugs. 1/24/12 RP 80, 82. The price for the cheaper of the two packages was \$21,000, with the broker's fee. 1/24/12 RP 81-2, 85-6. The

more expensive package was to be sold at \$24,000 with the broker's fee.
1/24/12 RP 85.

Huynh arranged to set up a three kilogram deal in March of 2011, at the Burlington Haggen's store. 1/25/12 RP 108. Huynh had initiated the call, but ended up canceling the delivery. 1/25/12 RP 109. Huynh also sent text messages scheduling the deal. 1/25/12 RP 110. Huynh told Delacruz the drugs were going to be sent to Canada. 1/25/12 RP 110. On April 15, 2011, Huynh started contacting Delacruz to set up a deal for a certain group. 1/26/12 RP 9. This group was the one that eventually lead up to a deal. 1/26/12 RP 9, 11. Huynh tried to arrange the deal again on April 22nd and May 6th, but both fell through. 1/25/12 RP 113, 1/26/12 RP 11-12. Huynh texted Delacruz on May 7th saying:

Chino go the money squared away, having them send it to me to prove it, and I will send it to you to see, and if you still down, sorry man.

1/26/12 RP 12. Huynh appeared to be arranging the transactions to get the finder's fees in cash and also to get samples. 1/25/12 RP 167-8. On May 17, 2012, Delacruz got a text message from Huynh to arrange a deal for Friday, May 29th.

On May 20th, Huynh contacted Delacruz again between noon and 2:00 and said that he was ready to do the deal. 1/25/12 RP 115. They agreed on a price of \$42,000 for two kilograms plus the \$2,000 fee. 1/25/12

RP 115. Delacruz was not sure it was going to happen until Huynh called back from Seattle indicating he was with the buyer. 1/25/12 RP 116-7. They arranged to meet at the same restaurant. 1/25/12 RP 121. Officer couldn't get DEA agents available so they set up other officers as surveillance. 1/25/12 RP 122. Delacruz wore a body wire. 1/25/12 RP 125. Delacruz parked outside and went in to the restaurant. 1/25/12 RP 125. Huynh and two other individuals were sitting at a table next to the bar. 1/25/12 RP

Agent Delacruz identified Raymond Mak, one of the defendant's sitting in court, as one of the other individuals he met on May 20, 2012. 1/24/12 RP 83, 126. The other individual was Mr. Lin. 1/25/12 RP 126.³ Huynh took Delacruz outside to talk. 1/25/12 RP 126. Huynh told Delacruz he was getting \$2,000 for each kilogram. 1/25/12 RP 127. Huynh also talked about future transactions. 1/25/12 RP 127. Huynh wanted to use the term BMW for one kilogram, Cadillac for two kilograms, and use east coast times for meetings. 1/25/12 RP 127. Huynh indicated future buys would be three to five kilograms per week, every other week. 1/25/12 RP 127. Delacruz and Huynh went back inside with the other two men. 1/25/12 RP 128. At the table, Delacruz spoke with both Mak and Huynh. 1/25/12 RP

³ Agent Delacruz later found out that Lin and Mak were Chinese and Huynh was Vietnamese. 1/26/12 RP 20

129. During the conversation, it appeared to Delacruz that Huynh had not told Mak about the sample that Huynh was asking for because Mak did not know about the sample. 1/25/12 RP 156. Delacruz said he wasn't going to show them anything until they showed him the money. 1/25/12 RP 129. Huynh and Mak went to the bathroom. 1/25/12 RP 129. Huynh then called Delacruz telling him to come to the bathroom. 1/25/12 RP 130. Mak was in the bathroom with Huynh, when Huynh pulled up his jacket sleeve and showed Delacruz bundles of \$100 bills stacked together. 1/25/12 RP 130. Photographs of the money bundled in amounts easier to count were admitted at trial. 1/25/12 RP 130-2. Mak wanted to see the cocaine. 1/25/12 RP 132-3. At that point, Delacruz had just Mak accompany him outside the restaurant and took him to the vehicle in which the cocaine was stored. 1/25/12 RP 134. Delacruz opened the trunk and Mak opened the bag, reached in and grabbed the kilo on top and looked at it. 1/25/12 RP 134. Delacruz also showed Mak the sample. 1/25/12 RP 134. Mak did not know anything about the sample. 1/26/12 RP 24.

During the walk to the vehicle and the walk back inside, Mak and Delacruz talked about Mak wanting to buy more. 1/25/12 RP 135. Mak said he wanted to purchase ten kilograms in the future. 1/25/12 RP 135, 1/26/12 RP 41-2. Mak said he and his brother were into moving all types of drugs and they talked about future deals. 1/25/12 RP 135, 138, 1/26/12 RP 40.

Delacruz gave Mak his number so they could deal directly without the middleman. 1/25/12 RP 135, 139. Mak's brother called concerned about the deal and getting a sample. 1/25/12 RP 136. Mak told his brother he had sampled it. 1/25/12 RP 136. Outside Mak pointed to his car, a BMW, which was parked in the lot in the first stall. 1/25/12 RP 136. They walked back inside the restaurant. 1/25/12 RP 136. They agreed to do the deal. 1/25/12 RP 140. Delacruz tried to get Huynh not to be present but Huynh insisted on being there. 1/25/12 RP 141.

They exited the restaurant to Delacruz's vehicle with Huynh as the front passenger and Mak seated behind Delacruz. 1/25/12 RP 141-2. Huynh brought out the jacket with the money. 1/25/12 RP 142. Delacruz drove around the lot to the back. 1/25/12 RP 142-3. Mak said he wanted his cocaine and they again showed Delacruz the money offering him to count it. 1/25/12 RP 143. Delacruz said he would not. 1/25/12 RP 143. Delacruz told Mak he would pop the trunk so Mak could grab the cocaine and go. 1/25/12 RP 143. Huynh handed Delacruz the money. 1/25/12 RP 144. Delacruz popped the trunk, and Mak got out. 1/25/12 RP 143. Mak took the bag with cocaine, closed the trunk and walked away. 1/25/12 RP 144, 186. Huynh told Delacruz he wanted the \$2,000, so Delacruz took \$2,000 from the bundle and counted it out to Huynh to get him to leave. 1/25/12 RP 144. Once Huynh left, and Delacruz saw Mak walking north. 1/25/12 RP 144.

Delacruz then saw Mak in his BMW exiting the restaurant. 1/25/12 RP 144. Delacruz saw a commotion behind him believing Lin and Huynh had been arrested but Mak was getting away. 1/25/12 RP 144. Delacruz notified two officers who pulled over Mak to arrest him. 1/25/12 RP 144. Delacruz and Detective Dave Floyd later counted out the money and determined there was \$42,000 and the commission of \$2,000 given to Huynh. 1/25/12 RP 146. Delacruz also saw the bag which had been in his car in the back of Mak's car after Mak was stopped and the trunk to his vehicle opened. 1/25/12 RP 186, 188.

Agent Samuel Rodriguez was a border patrol agent who was also detailed to work for the drug enforcement agency as an undercover officer. 1/24/12 RP 121. On February 10, 2012, Rodriguez assisted in the operation to show a buyer two kilograms of drugs. 1/24/12 RP 124-5. Rodriguez was the driver who dropped off Delacruz and brought the drugs to the back of the building to show the buyer. 1/24/12 RP 124-6.

Agent Jason Webber was a drug enforcement agency investigator in from the Bellingham office who worked in the Whatcom and Skagit County areas. 1/24/12 RP 137-8. Webber had checked subscriber information for a pre-paid phone number and it returned to a Jeffrey Huynh. 1/24/12 RP 141. Webber learned of a Portland address and photograph for Huynh from the Oregon Department of Licensing. 1/24/12 RP 141-2, 152. On February 10,

2011, Webber worked surveillance and saw a tan Toyota vehicle pull into the parking lot and the occupants meet with Delacruz. 1/24/12 RP 142, 153. After the viewing, Webber assisted in following the vehicle on Interstate 5 and Interstate 405, all the way towards Renton. 1/24/12 RP 144. In the Renton area, the vehicle did evasive driving maneuvers including a U-turn suggesting the vehicle was engaging in counter-surveillance to determine if it was being followed. 1/24/12 RP 145, 156. Surveillance was lost in the Renton area. 1/24/12 RP 156.

Agent Belanger was a Washington State Patrol Detective working with the Drug Enforcement Agency, who assisted in surveillance on February 10, 2011. 1/25/12 RP 3, 6. Belanger had a residence location for Jeffrey Huynh in Oregon and had surveillance set up to identify when he left Portland. 1/25/12 RP 7-8. Surveillance lost track of the vehicle when it left the interstate from Portland. 1/25/12 RP 8. Belanger saw the Camry driven by Huynh as it approached the restaurant from the freeway. 1/25/12 RP 9-10. Belanger maintained surveillance until the vehicle with Huynh and an Asian male passenger left the restaurant. 1/25/12 RP 11-4.

Belanger also testified about his experience with dealings in kilograms of cocaine. 1/25/12 RP 15. He testified that it is standard to charge a commission of about \$500, but that it can go up to \$2,000. 1/25/12 RP 15. Belanger testified that the stamps on the cocaine shown to Huynh,

show the region or organization where it was produced. 1/25/12 RP 16-7. The stamps are similar to a brand. 1/25/12 RP 17-8. Belanger testified that a kilogram of cocaine with purity above 80 percent is considered pure. 1/25/12 RP 19. As the cocaine moves along the distribution chain the purity is reduced as the cocaine is reprocessed or manufactured by cutting with other powdered products down to a purity of 5 to 15 percent for users. 1/25/12 RP 18-21, 28. Belanger testified that Skagit County is a hub for dealing and a kilogram worth \$21,000, in Skagit County would be worth \$30,000 to \$45,000 in Canada. 1/25/12 RP 25. Belanger testified that ounces of cocaine are usually sold locally for \$700 to \$800. 1/25/12 RP 27. Belanger calculated the weight and cutting of the two kilograms to be sold two to three times to determine a weight at the ounce level. 1/25/12 RP 29-30. At the ounce level, the value would be \$56,400 at \$800 an ounce and \$49,350 at \$700 an ounce. 1/25/12 RP 30. If stepped on again, the two kilograms would be valued at \$112,800, to \$98,700 based upon local price. 1/25/12 RP 30-1. The kilogram represented enough for 8,000 doses for users. 1/25/12 RP 32.

Detective Dave Floyd of the Skagit County Interlocal Drug Enforcement Unit testified being an undercover officer who assisted in the viewing arranged for February 10, 2011. 1/25/12 RP 91-3. Floyd assisted Delacruz in arranging the two kilograms of cocaine to be viewed. 1/25/12

RP 93-4. Floyd also provided surveillance monitoring a body wire worn by Delacruz. 1/25/12 RP 95-6. Floyd testified the discussion on the wire dealt a lot with prices and future quantities. 1/25/12 RP 99. Floyd heard Huynh ask to take a picture. 1/25/12 RP 99.

Floyd also was involved as the case agent and a cover officer on the transaction on May 20, 2011. 1/26/12 RP 129-30. Delacruz was again wearing a body wire which Floyd monitored. 1/26/12 RP 133-4. After Delacruz had gone into the restaurant, he came out with Huynh. 1/26/12 RP 134-5. Floyd could hear the conversation regarding amounts, vehicles corresponding to amounts and using the east coast time zone. 1/26/12 RP 135. Floyd saw Delacruz go outside with Mak and observe the trunk open on the undercover vehicle. 1/26/12 RP 136-7. After they walked away, Floyd heard a conversation about Mak making a phone call and the potential for future transactions. 1/26/12 RP 138. Once back inside, Floyd overheard Delacruz telling them he wasn't going to do the transaction in a public place. 1/26/12 RP 139. Delacruz and the other two exited the restaurant and went to the undercover vehicle which drove around to the back side of the restaurant. 1/26/12 RP 139-40. Floyd heard a discussion regarding the money and observed Mak exit the vehicle, remove something from the trunk and walk away. 1/26/12 RP 141. Once Delacruz finished counting the money to Huynh, he gave the arrest signal to Floyd. 1/26/12 RP 142. Mak

had already begun to back out of the parking lot and drive away. 1/26/12 RP 142. Floyd coordinated units to contact both vehicles. 1/26/12 RP 142.

Floyd was present when the search warrant was served on Mak's vehicle and took photographs which were admitted. 1/26/12 RP 143-4. Floyd identified the documents of dominion and control of the BMW showing it belonged to Mak. 1/26/12 RP 177-9. The documents from the vehicle showed that Mak was maintaining the vehicle and he was one of two registered owners. 1/26/12 RP 179-80. One document showed the vehicle was shipped by Mak from Texas to Renton in the end of January, 2011. 1/26/12 RP 188. Four phones related to Mak and his vehicle. 1/26/12 RP 183-4, 21. Lin and Huynh each had a phone. 1/26/12 RP 184. Floyd testified that it was common for dealers to have separate phones for dealing and personal use. 1/26/12 RP 18. There were also prepaid calling cards located in the BMW. 1/26/12 RP 18-9. A search warrant of the Honda revealed an expandable baton similar to a law enforcement baton and that the vehicle belonged to Lin in the Seattle area. 1/26/12 RP 184. Shears with suspected marijuana residue were located in Lin's vehicle. 1/26/12 RP 191. Also located was a \$6,000 withdrawal slip from a Bank of America account on May 18, 2011. 1/26/12 RP 4-5. Floyd had also arranged for air cover for the transaction, and had observed the video footage obtained. 1/26/12 RP 165-6. The video was admitted. 1/26/12 RP 168.

Jennifer Hinckley was an agent with the Department of Homeland Security who assisted with surveillance on the transaction on May 20, 2011. 1/26/12 RP 27, 44. Hinckley was called in late on that Friday to assist. 1/26/12 RP 28. The targets of the investigation arrived first, which was not ideal. 1/26/12 RP 28-9. As a result, officer did not know which vehicles they arrived in. 1/26/12 RP 29. Officers did not see the vehicle Huynh had arrived in previously in the parking lot. 1/26/12 RP 29.

Hinckley saw Agent Delacruz go inside and exit with Mak about fifteen to twenty minutes later. 1/26/12 RP 31. Hinckley saw them walk in the direction of Delacruz's car. 1/26/12 RP 31. They returned a short time later and had three to five minute conversation directly in front of Hinckley's car. 1/26/12 RP 32. Mak used his phone and appeared to have a conversation before they went inside. 1/26/12 RP 33. About five minutes later, Delacruz, Mak and Huynh left the restaurant going back to the undercover car. 1/26/12 RP 33-4. Another person was outside smoking and appeared to be doing counter-surveillance. 1/26/12 RP 35-6.

Hinckley then saw Mak leave the area where the undercover vehicle had been carrying a jacket over his arm with something underneath. 1/26/12 RP 37. Mak went to the back of his greenish-black BMW, opened his trunk and put something inside. 1/26/12 RP 37, 40. Mak appeared to gesture to the man smoking outside. 1/26/12 RP 38. Huynh then came back around

the front of the building as Mak began to drive away. 1/26/12 RP 38. Huynh went to a green Honda Civic two positions south and got inside with the man who had been outside smoking. 1/26/12 RP 38-9. Hinckley saw the arrest team arrive and pointed them toward Huynh and the man who was smoking. 1/26/12 RP 40-1, 55.

Detective Ben Hagglund of the Skagit County Sheriff's Office assisted in transaction on May 20, 2011, as part of the arrest team. 1/26/12 RP 57-8. Hagglund was partnered with Detective Meyer of the Sheriff's Office. 1/26/12 RP 58. Hagglund monitored radio traffic and when he got word, he went to arrest Huynh. 1/26/12 RP 60-1. Huynh was at the passenger side of a vehicle and Meyer arrested Lin. 1/26/12 RP 62. Hagglund searched Huynh on arrest and took a wad cash off his person which was taken as evidence. 1/26/12 RP 63-4, 68

Detective Tobin Meyer testified about assisting in the arrest team on May 20, 2011. 1/26/12 RP 70-1. Meyer was with Hagglund and the monitored radio traffic. 1/26/12 RP 71-2. Meyer was directed toward a vehicle by other agents and contacted Jaiyin Lin at the driver's side of a vehicle. 1/26/12 RP 73. Meyer also gathered the money totaling about \$2,000 taken by Hagglund off the passenger Huynh and provided that to Detective Neufeld. 1/26/12 RP 74-5.

Officer Dustin Richardson was a Mount Vernon Police Officer who assisted the arrest team on May 20, 2012. 1/26/12 RP 78-9. Richardson was in uniform in a marked patrol vehicle with another officer. 1/26/12 RP 80. As Richardson arrived at the restaurant to assist in the arrest, he was directed to a 2002 BMW 530 which had left. 1/26/12 RP 80, 89. Richardson was told the vehicle left with the cocaine inside and was told the direction the vehicle went. 1/26/12 RP 80-1. Richardson stopped the vehicle a few blocks away with lights and siren. 1/26/12 RP 81-2. Richardson had Mak step out of the vehicle and arrested him. 1/26/12 RP 83. Mak was the only one in the vehicle. 1/26/12 RP 91.

Duane Neufeld was a deputy with the Skagit County Sheriff's Office assigned to the Skagit County Interlocal Drug Enforcement Unit. 1/26/12 RP 92-3. Neufeld was an undercover officer who was assigned to surveillance on May 20, 2011. 1/26/12 RP 93, 95. Neufeld was assigned to keep watch on the drugs and the vehicle in which they were stored. 1/26/12 RP 96. Neufeld saw Huynh and Delacruz exit the restaurant for a short time and talk. 1/26/12 RP 98. Neufeld also saw Delacruz go out and open the trunk of the car showing the contents to Mak. 1/26/12 RP 99. He then saw Huynh, and Mak come out and go to the undercover vehicle. 1/26/12 RP 100. They drove the vehicle to a different location. 1/26/12 RP 100. Neufeld got word the BMW left the parking lot. 1/26/12 RP 101. Neufeld

heard the vehicle was stopped by marked police cars at an intersection nearby. 1/26/12 RP 102-3. Neufeld first drove around watching the area to see if there were other people who had been involved. 1/26/12 RP 103. He then went to the location of the traffic stop and took control of the vehicle. 1/26/12 RP 103-4. He arranged for the vehicle to be transported to the Mount Vernon Police Department to conduct a search. 1/26/12 RP 104. The bags of cocaine were located in the trunk along with a dark-colored coat. 1/26/12 RP 106-8. During the search of the vehicle, Neufeld collected two cell phones and documents showing the car belonged to Mak. 1/26/12 RP 109, 115-7, 177. During a search of the vehicle, there was a positive alert by a trained drug dog. 1/26/12 RP 122. Neufeld identified a video of the transaction taken from an aircraft arranged through Homeland Security Investigations. 1/26/12 RP 110-1.

Karen Finney a forensic scientist of the Washington State Patrol Crime Laboratory testified she performed an analysis of the three packages sold to Mak and found them to contain cocaine. 1/26/12 RP 152, 156, 158. Finney testified the gross weight on the two larger packages was 1,055 grams and 1,059 grams. 1/26/12 RP 159. The smaller Ziploc package contained 28.10 grams. 1/26/12 RP 159.

ii. Jury Instructions

As to the charge of possession with intent to manufacture or deliver a controlled substance the jury was instructed as to the elements of the offense as follows:

To convict the defendant, RAYMOND MAK, of the crime of possession with intent to manufacture or deliver a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 20, 2011, the defendant, RAYMOND MAK, or an accomplice, possessed a controlled substance – Cocaine;
- (2) That the defendant, RAYMOND MAK, or an accomplice, possessed the substance with the intent to manufacture or deliver a controlled substance – Cocaine, and
- (3) That this act occurred in the State of Washington.

CP 32. Manufacturing was also defined for the jury.

Manufacture means the direct or indirect production, preparation, compounding, conversion or processing of any controlled substance.

Manufacture also means the packaging or repackaging of any controlled substance or labeling or relabeling of the controlled substance's container.

CP 37. Delivery was defined.

Deliver or delivery means the actual or constructive or attempted transfer of a controlled substance from one person to another.

CP 38.

The charge of maintaining a vehicle for drug trafficking provided the elements for the State to prove.

To convict the defendant, RAYMOND MAK, of the crime of maintaining a vehicle for drug trafficking, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 20, 2011, the defendant, did keep or maintain any vehicle;
- (2) That the defendant knew the vehicle was used for keeping controlled substances in violation of law, and
- (3) That this act occurred in the State of Washington.

CP 43.

IV. ARGUMENT

1. Possession with intent to manufacture or deliver is not an alternative means crime.

The Legislature defined three crimes in RCW 69.50.401: “it is unlawful for any person to [1] manufacture, [2] deliver, or [3] possess with intent to manufacture or deliver, a controlled substance.” RCW 69.50.401(1) (numbers added). The jury convicted defendant Mak of the third crime, possession with intent to manufacture or deliver. CP 53. Defendant now argues the Legislature defined alternative means for this third crime, possession with intent to manufacture or possession with intent to deliver.

Defendant’s alternative means argument regarding alternative means fails for three reasons. First, the Legislature intended to create one crime phrased in the disjunctive – possession with intent to manufacture or deliver. That alone does not create alternative means. “[A] defendant may not simply point to an instruction or statute that is phrased in the disjunctive in

order to trigger a substantial evidence review of her conviction.” State v. Smith, 159 Wn.2d 778, 783, 154 P.3d 873 (2007).

Second, the possession statute does not resemble the other criminal statutes that create alternative means for proving a crime.

Alternative means crimes are ones that provide that the proscribed criminal conduct may be proved in a variety of ways. As a general rule, such crimes are set forth in a statute stating a single offense, under which are set forth more than one means by which the offense may be committed. Criminal assault is just such a crime.

State v. Smith, 159 Wn.2d at 784. Unlike the assault statute, RCW 69.50.401 lists three separate crimes and does not give more than one means that a person can commit the crime. The assault statute provides multiple alternative means.

The legislature has codified four degrees of criminal assault. Between the crimes of first, second, and third degree assault, the legislature has delineated a total of 17 alternative means of commission. See RCW 9A.36.011-.031. As promulgated by the legislature, the second degree criminal assault statute articulates a single criminal offense and then provides six separate subsections by which the offense may be committed. RCW 9A.36.021(1)(a)-(f).

State v. Smith, 159 Wn.2d at 784 (2007).

Third, no Washington court has held that possession with intent to manufacture or deliver states alternative means. Defendant relies on standards from cases involving rape, burglary and taking a motor vehicle. Brief of Appellant at pages 7-8. All of these statutes, though, fit the pattern

described by the Supreme Court in Smith: a general crime followed by subsections defining how to commit the crime. State v. Smith, 159 Wn.2d at 784-85. No support exists for declaring possession with intent to manufacture or deliver an alternative means crime. The sole case involving drug charges cited by Mak, is State v. DeVries, 149 Wn.2d 842, 72 P.3d 748 (2003). That case is cited solely for the standard relating to sufficiency of the evidence and not an analysis of alternatives means. Brief of Appellant at page 8.

In addition, contrary to Mak's assertion, there was sufficient evidence from which a jury could infer Mak had the intent to manufacture.

2. There was sufficient evidence of possession with intent to manufacture as manufacturing is defined by law.

Mak's argument seeking reversal of the conviction for possession with intent to manufacture or deliver also fails because there was sufficient evidence from which the jury could infer he had the intent to manufacture or deliver. However, even assuming that the offense involves alternative means, there was sufficient evidence from which the jury could infer the intent to manufacture.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State

v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). When the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992); State v. Partin, 88 Wn.2d 899, 567 P.2d 1136 (1977). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068, 1074 (1992); State v. Theroff, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385, 622 P.2d 1240 (1980).

If the evidence is sufficient to support each of the alternative means submitted to the jury, a particularized expression of unanimity as to the means by which the defendant committed the crime is unnecessary to affirm a conviction because we infer that the jury rested its decision on a unanimous finding as to the means. State v. Ortega-Martinez, 124 Wn.2d 702, 707-8, 881 P.2d 231 (1994).

Mak does not contend there was insufficient evidence of intent to deliver. Brief of Appellant at page 8-9. Mak only attacks the intent to manufacture, arguing the evidence could not support a jury's inference that he intended to "step on" or process the drug. Brief of Appellant at page 10.

Mak's acknowledges there was significant expert testimony supporting that the drugs purchased are typically diluted or "stepped on" by using fillers to create more product and increase profit. Brief of Appellant at pages 9-10. However, Mak contends that there was "no evidence whatsoever to support that there was a plan to do that in this case." Brief of Appellant at page 10. He concludes that "[m]erely having the police speculate about manufacturing in the drug industry does not provide any evidence that Mak or Huynh formed the intent to manufacture in this case." Brief of Appellant at page 10.

This argument fails in two significant manners. First, manufacturing had a specific definition which was provided to the jury which provided a description of what amounts to manufacturing.

Manufacture means the direct or indirect production, preparation, compounding, conversion or processing of any controlled substance.

Manufacture also means the packaging or repackaging of any controlled substance or labeling or relabeling of the controlled substance's container.

CP 37. Under the instruction, any processing of the drugs or packaging or labeling would amount to manufacturing. Mak's arguments pertain solely to processing. A jury could reasonably infer that because the purpose in purchasing large quantities of drugs is to make a profit and that profit is

achieved by maximizing the quantity and price of the drugs, that Mak and his partners intended to process or package the drugs.

Second, Mak's contention that there had to be some evidence from Mak or Huynh of the intent to manufacture fails to take into account the proper standard under the law. Reviewing sufficiency of the evidence all reasonable inferences in favor of the verdict and interpret them "most strongly against the defendant." State v. Zunker, 112 Wn. App. 130, 135, 48 P.3d 344 (2002) (citing State v. Gentry, 125 Wn.2d 570, 597, 888 P.2d 1105 (1995)), *rev. denied*, 148 Wn.2d 1012 (2003). "Credibility determinations are for the trier of fact and cannot be reviewed on appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Mak essentially contends that the jurors could not infer from the evidence that Mak and Huynh had no intent to package or process the drugs and could only infer it would be sold in the same manner as it was given to Mak. The testimony of the officers would instead support a different rational inference of their intent.

Agent Belanger testified in detail about the manner and prices related to cocaine trafficking. The stamps on the cocaine shown to Huynh, show the region or organization where it was produced. 1/25/12 RP 16-7. The stamps are similar to a brand. 1/25/12 RP 17-8. A kilogram of cocaine with a purity above 80 percent is considered pure. 1/25/12 RP 19. As the cocaine moves

along the distribution chain the purity is reduced as the cocaine is reprocessed or manufactured by cutting with other powdered products down to a purity of 5 to 15 percent for users. 1/25/12 RP 18-21, 28. Skagit County, a hub for dealing, is where a kilogram of cocaine is worth \$21,000. 1/25/12 RP 25. Ounces of cocaine are usually sold locally for \$700 to \$800. 1/25/12 RP 27. Belanger calculated the weight and cutting of the two kilograms to be sold two to three times to determine a weight at the ounce level. 1/25/12 RP 29-30. At the ounce level, the value would be \$56,400 at \$800 an ounce and \$49,350 at \$700 an ounce. 1/25/12 RP 30. If “stepped on” again, the two kilograms would be valued at \$112,800, to \$98,700 based upon local price. 1/25/12 RP 30-1. The kilogram represented enough for 8,000 doses for users. 1/25/12 RP 32. As testified to by Agent Delacruz, the drugs they were dealing were of a quality to be cut before being sold to others who would then use or re-sell the drugs and that pretty much everyone who touches it “steps on it.” 1/24/12 RP 80, 82.

The jury could reasonably infer Mak and Huynh had the intent to process or package the drug for further sales.

Viewing the evidence in favor of the State, the jury appropriately found defendant guilty of possession with intent to manufacture. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

- 3. Where the defendant actually kept the kilograms of cocaine purchased in the vehicle he owned when it was stopped by officers and he told the undercover agent of the intent to engage in future kilograms, there was sufficient evidence to support keeping the vehicle to keep drugs.**

Mak was convicted in Count II of Maintaining a Vehicle or Premises for Drug Trafficking, which is defined by RCW 69.50.402(1)(f) as follows:

(1) It is unlawful for any person to:

...

(f) knowingly to keep or maintain any store, shop, warehouse, dwelling, building, vehicle, boat, aircraft, or other structure or place, which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances, or which is used for keeping or selling them in violation of this chapter.

Broken down, this statute actually involves two elements, the second of which can be committed in two manners. The first element requires the person to “knowingly to keep or maintain” the place or vehicle. The second element requires one of two alternatives given the use of the terms “which” and “or which” in the statute. The first alternative is: “which is resorted to by persons using controlled substances in violation of this chapter for the purpose of using these substances.” The second alternative is “which is used for keeping or selling them in violation of this chapter.”

Mak contends the evidence was insufficient to support the offense. He did not note that this case involves the second of those alternatives. As

instructed, the jury was limited to the offense of maintaining or keeping the vehicle to keep drugs, the second alternative of the second element.

To convict the defendant, RAYMOND MAK, of the crime of maintaining a vehicle for drug trafficking, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about May 20, 2011, the defendant, did keep or maintain any vehicle;
- (2) That the defendant knew the vehicle was used for keeping controlled substances in violation of law, and
- (3) That this act occurred in the State of Washington.

CP 43.

The State contends there was sufficient evidence to support the defendant keeping or maintaining the vehicle and that he kept the drugs in the vehicle. He purchased the drugs as part of a significant drug deal and used his vehicle to transport them from the scene. He also was establishing a relationship with the seller using the vehicle.

Mak relies upon State v. Ceglowski and State v. Marin, to contend use of the vehicle on this occasion to drive to the deal and to keep the drugs was insufficient to establish the vehicle was kept or maintained for drug trafficking. Brief of Appellant at page 13-14. In neither of those cases, was the distinction between the alternatives of use, or keeping and selling was apparently raised in the appellate court. Furthermore, both cases involve small quantities of drug.

In State v. Ceglowski, the defendant, although tried for possession of intent to deliver, was convicted of maintaining a store for keeping or selling controlled substances. State v. Ceglowski, 103 Wn. App. 346, 12 P.3d 160 (2000). The defendant in Ceglowski appealed the sufficiency of the evidence for his conviction under the drug house statute. The appellate court reviewed the evidence and found insufficient evidence to support the defendant's conviction for maintaining a store for purposes of drug trafficking. In Ceglowski, the police had located a rolled up bill of U.S. currency, a small tray with traces of brown powder, and a small baggie with brown powder in an office desk drawer. The police also located a marijuana pipe, approximately \$600 in currency, and another baggie containing brown powder in the desk. The brown powder was later determined to be methamphetamine with a street value of \$70-\$150.

The court held that to constitute the crime of maintaining a premises for the purpose of unlawfully keeping or selling controlled substances there must be: 1) some evidence that the drug activity is of a continuing and recurring character; and 2) that a substantial purpose of maintaining the premises is for the illegal drug activity. State v. Ceglowski, 103 Wn. App. 346. The court found there was insufficient evidence in that case. However, the court went on to state that **“this rule does not mean that a small quantity of drugs or evidence found on only ‘a single occasion cannot be**

sufficient to show a crime of a continuing nature.” State v. Ceglowski, 103 Wn. App. at 353 (emphasis added); quoting Barnes v. State, 255 Ga. 396, 339 S.E.2d 229, 234 (1986). In Ceglowski the jury found the defendant not guilty of possession with intent to deliver and the charge involved only small quantities of drug.

Furthermore, the court in Ceglowski, created elements related to the offense in requiring the activity to be of continuing and recurring character and that a “substantial purpose” of the maintaining of the premises must be for drug trafficking. The State contends this is inappropriate addition of elements which are not part of the statute as drafted by the legislature. Even given these additional requirements, as explained below, the State believes the evidence here supports the conviction.

In State v. Marin, 150 Wn. App. 434, 208 P.3d 1184 (2009), police conducted a vehicle search incident to Marin's arrest and found a blue bag hidden inside an armrest. The bag was filled with a pipe, a small digital scale, and plastic baggies containing more than 45 grams of methamphetamines worth thousands of dollars. Police also found two small baggies containing trace amounts of apparent drug residue, a small canister in the van's unlocked glove compartment containing 6.1 grams of methamphetamines, and a key fob in the van's center console containing 1.85 grams of methamphetamines. With the aid of a drug sniffing dog,

police discovered a large hidden compartment under the hood of the van. State v. Marin, 150 Wn.App. at 437-39. The hidden compartment “had only recently been built into the van.” State v. Marin, 150 Wn.App. at 439. The defendant was not the registered owner of the van and only admitted to possessing and using the vehicle for several days prior to arrest. Id. But, evidence was presented that he was the owner in fact and that neither registered owner came forward to claim the vehicle after seizure. Id. The defendant was convicted of simple possession of controlled substance and maintaining a vehicle for drug trafficking. The evidence was held sufficient to establish that the vehicle was used for illegal drug activity of a recurring nature.

Similar to Ceglowski, Marin only involved a single instance of possession of a small quantity of drugs. But in Marin, despite the small quantity, modification of the vehicle was the supporting factor establishing the on-going nature of the drug activity despite the small quantity.

As opposed to Ceglowski and Marin, the case here included convictions for possession with intent to deliver or manufacture as well as conspiracy to deliver a controlled substance. Thus, the jury found that Mak was dealing in drugs. The jury also found an aggravating factor of a significant quantity. The present case involved more than a single incident

of a small quantity but instead was part of significant cocaine distribution activity by Mak.

This distribution involved the vehicle owned by Mak. 1/16/12 RP 177-80. He had transported the vehicle from Texas to Renton in January of 2011. 1/26/12 RP 188. There were documents in the vehicle showing that Mak was maintaining the vehicle. 1/26/12 RP 179-80. During a search of the vehicle, there was a positive alert by a trained drug dog. 1/26/12 RP 122.

The two kilograms of cocaine was purchased for \$42,000. 1/25/12 RP 146. During the walk to the vehicle and the walk back inside, Mak talked about wanting to buy ten kilograms in the near future. 1/25/12 RP 135, 1/26/12 RP 41-2. Mak said he and his brother were into moving all types of drugs and they talked about future deals. 1/25/12 RP 135, 138, 1/26/12 RP 40. The agent and Mak exchanged phone numbers so they could deal directly without the middleman. 1/25/12 RP 135, 139. After discussing future deals, Mak pointed out his vehicle, a BMW parked in the lot to the agent. 1/25/12 RP 136.

This supports a reasonable inference by the jury that Mak was establishing a relationship with the dealer and showing his vehicle for future contacts. This supports significant drug activity involving the vehicle was of a reoccurring nature. Although there was one delivery, the delivery was for \$42,000. This likely far exceeded the value of the BMW

in which the drugs were transported, and was sufficient for a rational trier of fact to find the vehicle was kept or maintained for keeping of drugs.

Under the language of Ceglowski, a single occasion can be sufficient to show a crime of a continuing nature. Since Mak was convicted as a large volume drug dealer, the jury could reasonably infer this was his continuing business. His vehicle, which he showed to the dealer, was part of his business.

V. CONCLUSION

For the foregoing reasons, Raymond Mak's convictions must be affirmed.

DATED this 21st day of November, 2012.

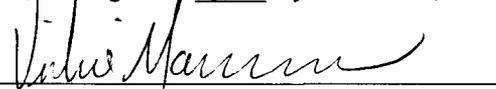
SKAGIT COUNTY PROSECUTING ATTORNEY

By: 
ERIK PEDERSEN, WSBA#20015
Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Vickie Maurer, declare as follows:

I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Rebecca Bouchey, addressed as Nielsen, Broman & Koch, PLLC, 1908 E Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21st day of November, 2012.


VICKIE MAURER, DECLARANT