Filed
Washington State
Court of Appeals
Division Two

July 11, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. KENNY EUGENE BAIER, Appellant.	No. 48468-4-II UNPUBLISHED OPINION

JOHANSON, J. — Kenny E. Baier appeals his jury trial convictions and sentence for delivery of a controlled substance and sale of a controlled substance for profit-heroin.[1] We agree with Baier that the admission of portions of a detective's testimony violated the confrontation clause and that the error was not harmless. We also address and reject Baier's statement of additional grounds (SAG)[2] claims of ineffective assistance for failure to bring a *Knapstad*[3] motion

[1] Former RCW 69.50.401 (2013) and RCW 69.50.410, respectively.

[2] RAP 10.10.

[3] *State v. Knapstad*, 107 Wn.2d 346, 356, 729 P.2d 48 (1986).

and of prosecutorial vindictiveness.[4] Accordingly, we reverse Baier's convictions and remand for a new trial.

FACTS

I. BACKGROUND

In November 2014, a confidential informant (CI[5]) engaged in a controlled narcotics purchase directed by Detective Krista McDonald. Detective McDonald instructed the CI "to make arrangements to do a controlled purchase of narcotics" and after "that arrangement was made," Detective McDonald drove the CI to the purchase location. 1 Report of Proceedings (RP) at 105. While police watched, the CI exchanged something with Baier; she acquired a "pea[-sized]" "brown" piece of "heroin." 1 RP at 150, 171. Baier was subsequently arrested and charged with two counts: delivery of a controlled substance-heroin and sale of a controlled substance-heroin, with a school zone enhancement for each count.

[4] Because we reverse and remand for a new trial, we do not address the remainder of Baier's arguments: that absent the evidence admitted in violation of the confrontation clause there was insufficient evidence to support his convictions, *see State v. Jasper*, 174 Wn.2d 96, 120, 271 P.3d 876 (2012), that the sentencing court erred, and his SAG arguments that his counsel rendered ineffective assistance, that the prosecutor committed misconduct, and that the judge committed judicial misconduct. However, we address Baier's prosecutorial vindictiveness claim and ineffective assistance claim for counsel's failure to bring a *Knapstad* motion because if those claims succeeded, the remedy would be to dismiss the charges against Baier rather than to remand for a new trial. *See United States v. Meyer*, 810 F.2d 1242, 1249 (D.C. Cir. 1987), *cited in State v. Korum*, 120 Wn. App. 686, 718-19, 86 P.3d 166 (2004), *rev'd in part on other grounds*, 157 Wn.2d 614, 141 P.3d 13 (2006); CrR 8.3(c); *State v. Maynard*, 183 Wn.2d 253, 262, 351 P.3d 159 (2015).

[5] We use "CI" to refer to a particular person, and we use "confidential informant" to refer to informants generally.

II. MOTION IN LIMINE: DETECTIVE MCDONALD'S TESTIMONY

Before trial, Baier moved to exclude any "testimony or reference to [the CI's] telephone call with [Baier]" as hearsay, the admission of which Baier specifically claimed would violate the confrontation clause. Clerk's Papers (CP) at 42. Baier contended that the CI was available to testify, although the State responded that it was "look[ing] for" the CI but did not expect her to testify. 1 RP at 14. The State argued that testimony related to the phone call fell within hearsay exceptions and thus could be admitted. The State asserted that "[i]f it's not hearsay, then confrontation does not come into play." 1 RP at 55.

The trial court admitted Detective McDonald's "summary . . . that the CI and she had an arrangement whereby the CI would attempt to get drugs" and noted that Detective McDonald was subject to cross-examination. 1 RP at 60. Detective McDonald would be allowed to testify relating to her observations, including that she overheard the CI making arrangements. The trial court did not make any finding regarding the CI's availability to testify at trial. After the trial court made its ruling, Baier repeated his objection that the admission of any phone call-related testimony violated the confrontation clause.

III. TRIAL

A. STATE TESTIMONY

Detective McDonald testified that she worked with confidential informants to arrange controlled narcotics purchases. Typically, Detective McDonald would meet a confidential informant in a secure location, discuss whom the confidential informant would target to purchase narcotics, and search the confidential informant for drugs or money. Detective McDonald would

then provide the confidential informant with prerecorded money, and Detective McDonald and other police would monitor the purchase.

Detective McDonald described in detail the one controlled purchase that she coordinated with the CI. The CI sat in Detective McDonald's car, and Detective McDonald drove the CI to a church parking lot and "directed her to make arrangements to do a controlled purchase of narcotics." 1 RP at 105. "[O]nce that arrangement was made," Detective McDonald "searched [the CI's] person to make sure that there was nothing on her." 1 RP at 105. On redirect, the following exchange occurred between the prosecutor and Detective McDonald:

> [Prosecutor:] So can -- can we go back to when you met with the [CI], at -- in the church parking lot, and just briefly from the time that you directed [the CI] to arrange for -- *to arrange to purchase heroin*, what happened immediately after that?
>
> And not what did people say but what happened immediately after you directed her to do that?
>
> [Detective McDonald:] The phone call was made on a cell phone. *After the arrangement was made*, she was -- her person was searched, her purse was searched.

1 RP at 160 (emphasis added).

Detective McDonald then provided the CI with $60 for the purchase and drove to a location close to a supermarket parking lot; they arrived at the parking lot within half an hour of when the CI was searched. Detective Eric Janson watched as the CI approached Baier, who was in the passenger seat of a car in the parking lot, and "the two exchanged something through the window."[6] 2 RP at 202. Detective McDonald testified that the CI returned to the car and provided Detective McDonald with a "small piece of heroin in some plastic wrap." 1 RP at 111. Chemical analysis

[6] Detective Janson photographed the entire transaction, and these photographs were admitted as trial exhibits.

confirmed that the "brown material" that the CI provided was 0.3 grams of heroin. 1 RP at 171. Detectives searched the CI again but found nothing "of note." 2 RP at 219. According to Detective McDonald, 0.3 grams of heroin was worth approximately $60.[7]

The CI did not testify at trial.

B. MOTION TO DISMISS

When the State rested, Baier moved to dismiss the charges against him on the basis that the State had not shown sufficient evidence that Baier knew the substance he had provided was heroin. The trial court denied the motion because there was sufficient evidence from which the jury could infer that arrangements were made to purchase heroin and that the purchase occurred.

C. CLOSING ARGUMENT AND JURY VERDICT

The "to convict" jury instructions required that the State prove beyond a reasonable doubt that Baier "knew that the substance [delivered or sold] was Heroin." CP at 83, 86. In closing, the prosecutor argued that the State had shown that Baier delivered heroin to the CI based on evidence that Detective McDonald instructed the CI to purchase heroin and that the CI "made a phone call and arrangements were made." 2 RP at 249. Further, while under surveillance, the CI had engaged in a "hand-to-hand transaction" with Baier, in which something was passed between the two, and the CI had returned to Detective McDonald with the heroin and without the prerecorded money. 2 RP at 251. The prosecutor emphasized that the evidence showed that Baier knew the substance was heroin: "the CI was directed to make a delivery for heroin, arrangements were made, and

[7] Another detective similarly testified that heroin is worth $15 to $20 per tenth of a gram.

[Baier] passed heroin over to [the CI]." 2 RP at 259. And the prosecutor argued that the sale had been for profit because the CI left with the prerecorded money but returned without it.

In closing, Baier attacked the CI's credibility, arguing that the CI was untrustworthy and that she could have hidden drugs on her person rather than actually purchasing drugs from Baier.

The jury found Baier guilty of the sale and delivery of heroin and that both crimes had been committed within 1,000 feet of a school bus route stop.

Baier appeals his convictions and sentence.

ANALYSIS

I. CONFRONTATION CLAUSE

Baier argues that the admission of two categories of Detective McDonald's statements violated the confrontation clause—first, her statement that she "directed [the CI] to make arrangements to do a controlled purchase of narcotics" and second, her two statements that an "arrangement was made," the latter of which referenced an arrangement "to purchase heroin." 1 RP at 105, 160. The State responds that Baier waived his confrontation clause argument and that even if we consider his argument's merits, there was no confrontation clause violation. We agree with Baier that the admission of Detective McDonald's second statement that an "arrangement was made," in response to a question referencing an arrangement "to purchase heroin," violated the confrontation clause. 1 RP at 105, 160.

A. NOT WAIVED

As a preliminary matter, we address the State's argument that Baier waived his confrontation clause argument because he failed to object when Detective McDonald testified. We disagree.

A party losing a motion in limine is "deemed to have a standing objection where a judge has made a final ruling on the motion." *State v. Powell*, 126 Wn.2d 244, 256, 893 P.2d 615 (1995). The exception is where "'the trial court indicates that further objections at trial are required when making its ruling.'" *Powell*, 126 Wn.2d at 256 (quoting *State v. Koloske*, 100 Wn.2d 889, 895, 676 P.2d 456 (1984), *overruled on other grounds by State v. Brown*, 111 Wn.2d 124, 761 P.2d 588 (1988), *superseded on reh'g*, 113 Wn.2d 520, 782 P.2d 1013, 787 P.2d 906 (1989)).

The rule from *Powell* resolves the State's argument. Before trial, Baier objected to the admission of Detective McDonald's statements on the basis that the admission of testimony related to the CI's phone call violated the confrontation clause. The trial court definitively ruled that it would allow Detective McDonald to testify that she directed the CI to make a call and that she overheard the CI making arrangements. Baier repeated his confrontation clause objection immediately following the trial court's ruling. Thus, Baier is deemed to have a standing objection to the trial court's ruling. *Powell*, 126 Wn.2d at 256. We hold that Baier preserved his confrontation clause argument for appeal.

B. ADMISSION OF DETECTIVE MCDONALD'S STATEMENTS

Baier contends that Detective McDonald's statements that she directed the CI to "make arrangements to do a controlled purchase of narcotics," 1 RP at 105, and that an "arrangement was made," 1 RP at 160, were testimonial statements of an unavailable witness whom Baier had not had a prior opportunity to cross-examine. Baier claims that the State elicited from Detective McDonald testimony that the CI made arrangements with Baier to purchase "drugs, specifically heroin." Br. of Appellant at 10. Accordingly, Baier argues that the statements' admission violated

his right to confront the witness against him and that the alleged error was not harmless because it was the only evidence that Baier knew the controlled substance was heroin.

The State responds that the statements were not testimonial and thus that their admission did not violate the confrontation clause.[8] Alternatively, the State argues that any error was harmless. We agree with Baier that the admission of Detective McDonald's second statement that an "arrangement was made," 1 RP at 105, in response to a question referencing an arrangement "to purchase heroin," 1 RP at 160, violated the confrontation clause and that the error in this regard was not harmless.

1. LEGAL PRINCIPLES

We review de novo whether evidence's admission violated the confrontation clause. *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007). The Sixth Amendment of the United States Constitution guarantees that "'[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.'"[9] *Crawford v. Washington*, 541 U.S. 36, 42, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (alterations in original) (quoting U.S. CONST. amend. VI).

[8] We do not address whether the statements were hearsay because "a statement is [not] immunized from a confrontation clause challenge simply because it is not offered for the truth of the matter." *State v. Berniard*, 182 Wn. App. 106, 129, 327 P.3d 1290 (2014); *see also Davis v. Washington*, 547 U.S. 813, 821, 126 S. Ct. 2266, 165 L. Ed. 2d 224 (2006) ("Only [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause."); *State v. Mason*, 160 Wn.2d 910, 922, 162 P.3d 396 (2007) ("[W]e are not convinced a trial court's ruling that a statement is offered for a purpose other than to prove the truth of the matter asserted immunizes the statement from confrontation clause analysis. To survive a hearsay challenge is not, per se, to survive a confrontation clause challenge.").

[9] The Washington Constitution art. 1, § 22, guarantees the accused's right "to meet the witnesses against him face to face." Baier cites art. 1, § 22, but makes no arguments based upon the state constitution. Accordingly, we do not address the state constitution. *See State v. Ohlson*, 162 Wn.2d 1, 10 n.1, 168 P.3d 1273 (2007).

The confrontation clause bars the admission of the testimonial statements of a witness who did not appear at trial unless the "the defendant had had a prior opportunity for cross-examination" and the State shows that the witness "was unavailable to testify." *Crawford*, 541 U.S. at 53-54, 57. Thus, the confrontation clause is not implicated where the witness is present and testifies at trial. *State v. Price*, 158 Wn.2d 630, 650, 146 P.3d 1183 (2006).

A "witness" is one who "'bear[s] testimony'"—a "'solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 51 (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)). Testimonial statements are those that are the functional equivalent of in-court testimony. *State v. Wilcoxon*, 185 Wn.2d 324, 334, 373 P.3d 224, *cert. denied*, 137 S. Ct. 580 (2016). This definition includes statements "made under circumstances that would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *State v. Chambers*, 134 Wn. App. 853, 860-61, 142 P.3d 668 (2006). Division Three has held that confidential informants' statements in the context of controlled purchases are generally testimonial: "Under the circumstances of a controlled buy, a reasonable confidential informant would believe [her] statement would further police investigations toward future criminal prosecutions and specifically that such statements 'would be available for use at a later trial.'" *State v. Hudlow*, 182 Wn. App. 266, 283, 331 P.3d 90 (2014) (quoting *Chambers*, 134 Wn. App. at 861).

Under the law of the case doctrine, "'[i]n a criminal case, the State assumes the burden of proving otherwise unnecessary elements of the offense when such elements are included without objection in a jury instruction.'" *State v. Witherspoon*, 180 Wn.2d 875, 884, 329 P.3d 888 (2014) (quoting *State v. Willis*, 153 Wn.2d 366, 374-75, 103 P.3d 1213 (2005)).

2. DETECTIVE MCDONALD'S STATEMENT DIRECTING THE CI

The first statement—that Detective McDonald "directed [the CI] to make arrangements to do a controlled purchase of narcotics"—concerns Detective McDonald's description of her own prior statements. 1 RP at 105. Detective McDonald was present and testified at trial. Thus, the first statement does not implicate the confrontation clause, and we do not complete the confrontation clause analysis. *See Crawford*, 541 U.S. at 53-54; *Price*, 158 Wn.2d at 650. We reject Baier's argument that the first statement's admission violated the confrontation clause.

3. DETECTIVE MCDONALD'S STATEMENTS THAT AN "ARRANGEMENT WAS MADE"

a. CONFRONTATION CLAUSE VIOLATED

We next address whether the admission of the second category of statements—Detective McDonald's two statements that an "arrangement was made," the second time in response to the prosecutor's question referencing an arrangement "to purchase heroin"—violated the confrontation clause. 1 RP at 105, 160.

Baier was charged with delivery and sale for profit of a controlled substance, former RCW 69.50.401 and RCW 69.50.410, and the jury was instructed for both counts that the State had to prove beyond a reasonable doubt that Baier "knew that the substance . . . was Heroin." CP at 83, 86. Thus, the State assumed the burden of proving that Baier knew that he delivered or sold heroin. *See Witherspoon*, 180 Wn.2d at 884.

On direct, Detective McDonald testified that an "arrangement was made." 1 RP at 105. On redirect, the prosecutor asked Detective McDonald, "[C]an we go back to when you met with the [CI] and just briefly from the time that you directed [the CI] to arrange for -- to arrange *to purchase heroin*, what happened immediately after that? And not what did people say but what

happened immediately after you directed her to do that?" 1 RP at 160 (emphasis added). Detective McDonald replied, "The phone call was made on a cell phone. After *the arrangement was made*, she was -- her person was searched, her purse was searched." 1 RP at 160 (emphasis added).

Detective McDonald's second statement, that "*the* arrangement was made," was made in response to the prosecutor's question that referenced an arrangement "to purchase heroin." 1 RP at 160 (emphasis added). "*The*" is "a function word to indicate that a following noun . . . refers to someone or something previously mentioned or clearly understood from the context or the situation." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2368 (2002). An arrangement by its nature is a mutual undertaking, requiring assent or participation by each party to it. WEBSTER'S 120. In context, where the last previous reference to an "arrangement" was the prosecutor's reference to an arrangement "to purchase heroin," Detective McDonald's statement amounted to testimony that the CI made an arrangement *to purchase heroin*. 1 RP at 160.

Detective McDonald had also testified that the CI sat in Detective McDonald's car and was driven to a church parking lot where the CI made arrangements for the purchase before she was searched. In context, Detective McDonald's testimony that an arrangement was made to purchase heroin indicated to the jury that the source of Detective McDonald's knowledge on this point was the CI. And the CI's statements regarding an arrangement to purchase heroin would have been to "further police investigations toward future criminal prosecutions" so that the CI's statements were testimonial, as is generally the case with a confidential informant's statements during a controlled buy. *Hudlow*, 182 Wn. App. at 283. Thus, Detective McDonald communicated to the jury the "functional equivalent" of "'in-court testimony'" by the CI. *Crawford*, 541 U.S. at 51; *Wilcoxon*, 185 Wn.2d at 334.

The State argues that there was no reference to any of the CI's statements or to Baier at all, so that the statement that an "arrangement was made" does not implicate the confrontation clause. 1 RP at 160. But as discussed, Detective McDonald's second statement that an "arrangement was made," in context with the prosecutor's question referencing an arrangement "to purchase heroin," conveyed to the jury that the CI had arranged to purchase *heroin*. 1 RP at 160. And although the testimony does not explicitly reference Baier, the inference is that an arrangement was made with Baier: the controlled purchase took place within half an hour of police searching the CI's person and thus shortly after the arrangement was made.

Notably, the State used Detective McDonald's testimony during closing argument for these very purposes. The prosecutor stated, "The timeline is . . . very telling here. The [CI] makes arrangements and 30 minutes later, who's pulling into the . . . parking lot? The defendant. . . . He's clearly there to meet her." 2 RP at 255. And the prosecutor argued that "circumstantial evidence" showed that "[Baier] knew that the substance was heroin" because "the CI was directed to make a delivery for heroin, arrangements were made, and the defendant passed heroin over to [the CI]." 2 RP at 259.

We hold that Detective McDonald's second statement that an "arrangement was made," in response to the question referencing an arrangement "to purchase heroin," was testimonial. 1 RP at 160.

We further agree with Baier that the exception for statements of an unavailable witness whom the defendant had a prior opportunity to cross-examine does not apply. *Crawford*, 541 U.S. at 53-54. The record does not show any prior opportunity for Baier to have cross-examined the CI, who was the source of the assertion that an arrangement was made *to purchase heroin*. Thus,

Detective McDonald's statement recounting the assertion does not fit within the exception for the statement of an unavailable witness whom the defendant had a prior opportunity to cross-examine.

For these reasons, we hold that the admission of Detective McDonald's second statement that an "arrangement was made," in response to the prosecutor's question referencing an arrangement "to purchase heroin," violated the confrontation clause. 1 RP at 160.

b. NOT HARMLESS ERROR

Because we agree with Baier that the admission of Detective McDonald's second statement violated the confrontation clause, we next analyze whether the error was harmless under the "'overwhelming untainted evidence'" test. *State v. Lui*, 179 Wn.2d 457, 495, 315 P.3d 493 (2014) (quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)). We hold that the error was not harmless.

Even where evidence's admission was constitutional error, the error is harmless "if the appellate court is assured beyond a reasonable doubt that the jury verdict cannot be attributed to the error." *Lui*, 179 Wn.2d at 495. In determining whether confrontation clause error is harmless, we examine whether the untainted evidence was "so overwhelming that it necessarily leads to a finding of guilt." *Lui*, 179 Wn.2d at 495.

Here, if we exclude the evidence that the CI made an arrangement with Baier to purchase heroin, the other evidence consisted of testimony that Detective McDonald provided the CI with $60, which was the cost of 0.3 grams of heroin, that police watched as the CI exchanged something with Baier, and that the CI returned to Detective McDonald with a pea-sized, brown piece of heroin weighing 0.3 grams and without the prerecorded money. This is circumstantial evidence that Baier

sold heroin, and this circumstantial evidence could support a finding that Baier knew that the substance was heroin rather than any other controlled substance.

But this untainted evidence is not "so overwhelming that it [would] necessarily lead[] to a finding of guilt," and we cannot say beyond a reasonable doubt that the jury's verdict is not attributable to the error in the admission of Detective McDonald's second statement that an "arrangement was made" to purchase heroin. *Lui*, 179 Wn.2d at 495; 1 RP at 160; *see also Hudlow*, 182 Wn. App. at 286-87 (holding in a controlled-purchase context that the defendant's behavior, the meeting's location and duration, and the CI's acquisition of a controlled substance and loss of the buy funds were not overwhelming evidence of the defendant's knowledge of the substance's identity).

Accordingly, Baier has succeeded in establishing that the error in the admission of Detective McDonald's second statement that an arrangement was made was not harmless and that Baier's convictions must be reversed.

II. SUFFICIENCY OF THE EVIDENCE OF BAIER'S KNOWLEDGE OF THE SUBSTANCE'S IDENTITY

Baier argues that after excising the evidence admitted in violation of the confrontation clause, there was insufficient evidence that he knew the substance that he delivered and sold to the CI was heroin.[10] We do not reach this argument.

[10] The parties agree that under the to-convict instructions, the State had to prove that Baier knew that the controlled substance was heroin. The United States Supreme Court adopted a contrary rule in *Musacchio v. United States*, where the Court held that when a jury instruction sets forth additional elements of a charged crime, we measure a sufficiency challenge against the charged crime's elements, not including the additional, instructed elements. __ U.S. __, 136 S. Ct. 709, 715, 193 L. Ed. 2d 639 (2016). Because neither party asks us to apply *Musacchio* and because our Supreme Court has not yet addressed whether that decision binds state courts, we apply existing Washington law. *See State v. Makekau*, 194 Wn. App. 407, 415, 378 P.3d 577 (2016).

In general, the charges against a defendant must be dismissed if the defendant shows that there was insufficient evidence to support his conviction. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). But in *Lockhart v. Nelson*, the United States Supreme Court held that "the Double Jeopardy Clause allows retrial when a reviewing court determines that a defendant's conviction must be reversed because evidence was erroneously admitted against him, and *also concludes that without the inadmissible evidence there was insufficient evidence to support a conviction*." 488 U.S. 33, 40, 109 S. Ct. 285, 102 L. Ed. 2d 265 (1988) (emphasis added).

Our Supreme Court has applied the rule from *Lockhart* to hold that where evidence was admitted in violation of the confrontation clause and that error was not harmless, it was incorrect to examine the sufficiency of the evidence after *excluding the tainted evidence* and accordingly dismiss the charges against the defendant. *State v. Jasper*, 174 Wn.2d 96, 120, 271 P.3d 876 (2012). The Supreme Court held that the appropriate remedy was to reverse the defendants' convictions and remand for new trials, not to dismiss the charges. *Jasper*, 174 Wn.2d at 120. Thus, where a defendant makes both a successful confrontation clause argument and an argument that the evidence was insufficient based upon exclusion of the confrontation clause-violative evidence, we do not dismiss the charges against the defendant because we agree with the sufficiency argument. *See Jasper*, 174 Wn.2d at 120. Rather, we remand for a new trial. *Jasper*, 174 Wn.2d at 120.

Put differently, "[i]f the evidence, including that erroneously admitted, [*Lockhart*, 488 U.S. 33], was insufficient as a matter of law, the double jeopardy clause entitles [the defendant] to dismissal with prejudice." *State v. Stanton*, 68 Wn. App. 855, 867, 845 P.2d 1365 (1993).

"Otherwise, [the defendant] *is entitled only to a new trial*." *Stanton*, 68 Wn. App. at 867 (emphasis added).

Here, just as in *Jasper*, Baier's sufficiency of the evidence challenge reiterates his confrontation clause argument and asks this court to consider whether "[a]fter excision of the tainted . . . evidence, the State's remaining . . . evidence [supports] a reasonable inference that Mr. Baier knew [the] item was heroin." Br. of Appellant at 16. Because in this context the remedy for Baier's claim of insufficient evidence would be precisely the same remedy as for his claimed confrontation clause violation—a new trial—we do not address Baier's sufficiency of the evidence argument. *See Jasper*, 174 Wn.2d at 120.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Baier also argues that his counsel's performance was deficient because his counsel failed to prepare a *Knapstad* motion that argued insufficient evidence of a sale "for profit" as required by RCW 69.50.410. We disagree.[11]

A claim of ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish ineffective assistance of counsel, the defendant must show both that his attorney's performance was deficient and that the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Prejudice is a reasonable probability that, but for the deficient performance, the outcome of the proceedings would have differed. *State v. Kyllo*,

[11] We address Baier's ineffective assistance of counsel claim for failure to bring a *Knapstad* motion because the remedy would be to dismiss the charges if we agreed with Baier. *Maynard*, 183 Wn.2d at 262; CrR 8.3(c).

166 Wn.2d 856, 862, 215 P.3d 177 (2009). "If either element of the test is not satisfied, the inquiry ends." *Kyllo*, 166 Wn.2d at 862.

To prevail on a *Knapstad* motion, a defendant must show that there are no material disputed facts and that the undisputed facts do not establish a prima facie case of guilt.[12] CrR 8.3(c); 107 Wn.2d at 356. Under *Knapstad*, a trial court may dismiss a criminal charge if the State's pleadings and evidence fail to establish prima facie proof of all elements of the charged crime. *State v. Sullivan*, 143 Wn.2d 162, 171 n.32, 19 P.3d 1012 (2001). RCW 69.50.410 makes it a felony "to sell for profit any controlled substance," with "for profit" meaning "obtaining . . . anything of value in exchange for a controlled substance." RCW 69.50.410(1)(b); *see also State v. Leek*, 26 Wn. App. 651, 654-55, 614 P.2d 209 (1980) (rejecting the defendants' claims that there was insufficient evidence that they sold a controlled substance "for profit").

At trial, the State introduced evidence that Detective McDonald coordinated a controlled purchase with the CI, including directing the CI to "make arrangements to do a controlled purchase of narcotics" and providing the CI with $60 of prerecorded money. 1 RP at 105. Police watched and photographed as the CI approached Baier and exchanged "something" with him through a car window. 2 RP at 202. The CI then returned to Detective McDonald with a small piece of heroin, worth $60, and without the purchase money. This evidence supports a conclusion that Baier provided heroin "for profit."

Baier specifically argues that there is no evidence of "for profit" delivery because no prerecorded funds were recovered, an argument that he claims his counsel should have made in a

[12] CrR 8.3(c) delineates the procedure to be followed for *Knapstad* motions.

Knapstad motion.[13] But this argument overlooks that the CI was given the prerecorded funds before the transaction and did not have the funds when she returned. The fact that the CI did not have the prerecorded funds when she returned to Detective McDonald supports a conclusion that the transaction was "for profit." Baier also appears to argue that his counsel should have pointed out that Detective McDonald did not see whom the CI called or overhear the recipient's conversation. But in light of the eyewitness testimony and photographic evidence of Baier's participation in the transaction, such an argument would have been unpersuasive as a reason to dispute the "for profit" element.

For these reasons, the State presented sufficient evidence to support a conclusion that Baier delivered heroin "for profit." There is accordingly no reasonable probability that the trial court would have granted Baier's *Knapstad* motion had Baier's attorney made the "for profit" arguments that Baier advances. *See* CrR 8.3(c); *Knapstad*, 107 Wn.2d at 356. Baier fails to show any prejudice; thus, his ineffective assistance of counsel claim must fail. *See Kyllo*, 166 Wn.2d at 862.

[13] In his SAG, Baier also cites to the record to argue that the for-profit element was not shown because there were "multiple questionable issues that had occurred here." SAG at 4. Baier apparently relies upon Detective Janson's testimony that "something" was exchanged between the CI and Baier, 2 RP at 202, that "nothing additional" was found upon the CI's person when police searched her again after the transaction, 2 RP at 228, and portions of the prosecutor's closing argument. But the trial testimony that Baier cites supports an inference that he delivered heroin "for profit," and we consider these arguments no further.

IV. PROSECUTORIAL VINDICTIVENESS

Baier claims that there was prosecutorial "vindictiveness" because the prosecutor filed charges more than nine months after the purchase. SAG at 5. We disagree.[14]

Prosecutorial vindictiveness violates due process and occurs when the government retaliates against a defendant in response to the defendant's prior exercise of constitutional or statutory rights. *State v. Korum*, 157 Wn.2d 614, 627, 141 P.3d 13 (2006). Thus, to be vindictive, a prosecutorial action must be "'*designed* to penalize a defendant for invoking legally protected rights.'" *Korum*, 157 Wn.2d at 627 (quoting *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987)).

Baier rests his argument upon the delay between the date of the controlled purchase and the date that the prosecutor filed charges. But fatal to Baier's argument, he does not explain how this delay was "vindictive" or point to any exercise of constitutional or statutory rights for which the prosecutor penalized him. Accordingly, we reject Baier's claim of prosecutorial vindictiveness.

[14] We address Baier's prosecutorial vindictiveness claim because the remedy would be to dismiss the charges vindictively brought, if we agreed with Baier. *See Meyer*, 810 F.2d at 1249, *cited in Korum*, 120 Wn. App. at 718-19; *see also United States v. Andrews*, 633 F.2d 449, 455 (6th Cir. 1980) ("If . . . a court finds that the situation before it presents a realistic likelihood of vindictiveness, the ordinary remedy is to bar the augmented charge.").

We reverse Baier's convictions and remand for a new trial.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

JOHANSON, J.

We concur:

WORSWICK, J.

BJORGEN, C.J.