

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

|                      |   |                                 |
|----------------------|---|---------------------------------|
| STATE OF WASHINGTON, | ) |                                 |
|                      | ) | No. 66543-0-I                   |
| Respondent,          | ) |                                 |
|                      | ) | DIVISION ONE                    |
| v.                   | ) |                                 |
|                      | ) |                                 |
| JAMI SHAWNELL HOWE,  | ) | UNPUBLISHED OPINION             |
|                      | ) |                                 |
| Appellant.           | ) | FILED: <u>November 19, 2012</u> |

Spearman, J. — A jury convicted Jami Howe of one count of possession of methamphetamine with intent to manufacture or deliver, for a transaction that took place on January 09, 2009 (Count I), and one count of delivery of methamphetamine, for a transaction occurring on December 23, 2008 (Count II). Howe appeals, arguing a warrantless search of her car was unlawful under the recent Supreme Court decision in State v. Snapp, 174 Wn.2d 177, 275 P.3d 289 (2012), and claiming the State violated her Sixth Amendment rights to confront and compel testimony from witnesses against her.

The State concedes that Snapp requires dismissal of Count I. This concession is well taken, and we reverse that conviction. Howe’s conviction for Count II, however, is affirmed. Howe’s right to confrontation was not violated

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because the record shows that Howe's objections to hearsay testimony from a police officer were sustained by the trial court.

We reverse Howe's conviction for Count I, affirm Count II, and remand for entry of an amended judgment of guilt and resentencing for Count II only.

### FACTS

On December 23, 2008, Detective Jose Vargas of the Snohomish Regional Drug Task Force (the Task Force) received information from an informant, Shane Heath, that Jami Howe was selling methamphetamine in Snohomish County. At Vargas's request, Heath called a person alleged to be Howe and talked about purchasing one ounce of methamphetamine. Vargas listened in on the conversation and heard a female voice tell Heath that it was ok to come to her house to purchase methamphetamine later that day. The voice specified that the gate to her property was frozen shut, and that Heath should go through the neighbor's property to get to her house.

That evening, Vargas and Detective Benjamin Olmsted searched Heath and his vehicle for drugs and money, and having found none, provided him with \$1,300 of pre-recorded buy money. The detectives followed Heath to Howe's home. They watched him park in the neighbor's driveway and then walk toward Howe's residence. Vargas testified, however, he did not see Heath enter Howe's residence. Howe's black BMW was parked in the driveway. Approximately 10 minutes later, the detectives saw Heath leave and drive off. No one else came or went from Howe's home in the 10 minutes that Heath was there. The detectives

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followed and met Heath at a predetermined location. They again searched him and his vehicle, finding no drugs or money. Heath gave the detectives a Christmas gift bag, which had one ounce of methamphetamine and a Christmas card with a picture of Howe and her boyfriend with the message, "Happy Holidays from Ryan and Jami." According to Heath, Howe handed the gift bag to him while he was in her residence.

On January 9, 2009, Vargas enlisted Heath to purchase more methamphetamine from Howe. Heath arranged for Howe to deliver the methamphetamine to his residence in Everett. When detectives saw Howe's car driving toward Heath's house, they pulled Howe over. Vargas arrested her for selling methamphetamine to Heath on December 23, and placed her in handcuffs in the police car. Vargas and Olmsted then searched Howe's car and found a cloth bag containing three baggies with methamphetamine, a digital scale, and packaging material. They also recovered a purse with a small amount of methamphetamine and \$693. Howe was charged with possession of methamphetamine with intent to manufacture or deliver, and delivery of methamphetamine.

Howe pleaded not guilty to both charges and moved to suppress all evidence, arguing lack of probable cause for stop and arrest, and challenging the warrantless search of her vehicle. At the suppression hearing, Vargas testified that he was contacted by Heath, who stated that he knew Howe, that he had purchased "meth" from her before, and that she sold it in quantities of ounces or

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better. Defense counsel did not object to Vargas's testimony at the suppression hearing.

During a colloquy following the testimony, defense counsel said he expected Heath to testify, and asked the court to set argument over for the purpose of conducting research regarding the propriety of informant testimony. Defense counsel knew Heath was the informant, but did not seek to subpoena or otherwise secure his attendance at the hearing. The court set the matter over one day. The next day, defense counsel argued that all evidence found on January 9, 2009, should be suppressed because the State had not shown facts indicating Heath was reliable. The court denied Howe's motion to suppress, concluding that the December 23 controlled buy carried indicia of reliability, and that it provided sufficient probable cause for arrest. Similarly, the court ruled that the search of Howe's vehicle was incident to arrest, and, therefore, valid.

During pre-trial motions, the State indicated it had subpoenaed Heath, but had not personally served him, and as such, it was unlikely Heath would show up.

At trial, the State introduced testimony of Task Force detectives Vargas, Olmsted, and Brian Emery. The State did not call Heath to testify. When Vargas tried to testify about what Heath told him, defense counsel objected. The court sustained the objections, struck the comments, and instructed the jury to disregard them. The jury convicted Howe as charged, and she appeals.

#### DISCUSSION

Howe argues the trial court's admission of Vargas' hearsay testimony at

the CrR 3.6 suppression hearing violated her Sixth Amendment rights to confront the State's confidential witness, and to compel testimony from the confidential informant. She also contends the trial court's admission of Vargas's hearsay testimony at trial violated her Sixth Amendment right to confrontation. We reject Howe's challenge to the CrR 3.6 ruling and conclude that no Sixth Amendment right violation occurred at trial.

### Suppression Hearing

Howe first argues the trial court's admission of Vargas's hearsay testimony at the CrR 3.6 suppression hearing violated her Sixth Amendment rights to confront the State's confidential informant, and to compel testimony from him. We disagree.

Howe did not object to Vargas's testimony at the CrR 3.6 hearing, and is instead raising the issue for the first time on appeal.<sup>1</sup> Generally, we do not consider arguments raised for the first time on appeal. RAP 2.5(a). A defendant may appeal a manifest error affecting a constitutional right, however, even if the issue was not raised before the trial court. RAP 2.5(a)(3). The defendant must identify a constitutional error and show that it had practical and identifiable consequences in the proceeding; it is this showing of actual prejudice that makes

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<sup>1</sup> Although counsel did not object to Vargas providing hearsay, counsel did seek a one-day continuance of the hearing to conduct research regarding the propriety of informant testimony. The next day, counsel argued that the evidence found on January 9, 2009, should be suppressed because the State could not establish Heath was reliable. At no time, however, did counsel move to suppress Vargas's testimony.

the error manifest, allowing appellate review. State v. Roberts, 142 Wn.2d 471, 500, 14 P.3d 713 (2000); State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999).

Here, Howe claims that her Sixth Amendment rights under the United States Constitution were violated in two ways. First, that the admission of Vargas's testimony at the CrR 3.6 suppression hearing regarding incriminatory statements made by Heath, violated her right to confront the witnesses against her. And, second, Heath's failure to testify at the suppression hearing violated her right to compel the attendance of a witness who could materially aid her defense.

In support of the former, Howe relies on Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004). In that case, the Supreme Court held that the admission of testimonial statements of a witness violates a defendant's right to confrontation unless the witness is available for cross-examination by the defendant. Id. at 68. But Howe's argument is not well taken because the right to confrontation is a trial right and does not apply to preliminary hearings on a motion to suppress. State v. Fortun-Cebada, 158 Wn. App. 158, 173, 241 P.3d 800 (2010); Barber v. Page, 390 U.S. 719, 725, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968) ("The right to confrontation is basically a trial right"). Because Howe had no right to confrontation at the suppression hearing, we find no error here, manifest or otherwise.

Additionally, to assert the Sixth Amendment right to compel attendance of a witness who could materially aid the defense, a defendant must make diligent

effort to secure attendance of that witness by following the procedures set forth by statutes and court rules. State v. Smith, 101 Wn.2d 36, 41-42, 677 P.2d 100 (1984). “The right to process to compel the attendance of witnesses must be asserted and maintained.” State v. Summers, 60 Wn.2d 702, 706, 375 P.2d 143 (1962). Here, Howe knew Heath’s identity, but simply failed to make any efforts to secure his attendance. A defendant may not complain of denial of compulsory process when she made no attempt to compel a witness’s testimony. Id.

In sum, Howe has failed to demonstrate manifest error affecting a constitutional right and her claims, raised for the first time on appeal are improperly before us. But even if we were to consider them, the claims are without merit and we reject them.

#### Trial

Howe next argues the trial court’s admission of Vargas’s hearsay testimony at trial violated her Sixth Amendment right to confrontation. We disagree.

This court reviews a trial court’s ruling on a hearsay objection for an abuse of discretion. State v. Mason, 160 Wn.2d 910, 922, 162 P.3d 396 (2007) (citing State v. Stenson, 132 Wn.2d 668, 940 P.2d 1239 (1997)). A trial court abuses discretion if its decision is manifestly unreasonable or is based on untenable reasons or grounds. Id. Whether or not a statement is hearsay is a question of law that this court reviews de novo. State v. Edwards, 131 Wn. App. 611, 614, 128 P.3d 631 (2006) (citing State v. Neal, 144 Wn.2d 600, 607, 30 P.3d 1255

(2001). Hearsay is a statement, other than one made by the declarant while testifying at trial, offered to prove the truth of the matter asserted. ER 801(c). Absent a qualifying exception, hearsay statements are not admissible. ER 802.

Howe argues the trial court erred by allowing Vargas to testify that Heath purchased drugs from Howe. But the record shows that when Vargas attempted to testify about Heath's statements regarding the drug purchases from Howe, the court sustained Howe's objection.

Q: Tell us a little bit in more detail about what transpired when you set up a controlled buy? How did that happen?

A: I met with the informant. Just prior to meeting him, I had asked the informant to go call Jami Howe and see if we could purchase some methamphetamine; particularly, I wanted an ounce. So he said he would do that.

I also asked –

MR. THOMPSON: Objection, Your Honor, hearsay.

THE COURT: I will sustain the objection, strike the response what the informant said. The jury will disregard it.

Verbatim Report of Proceeding (VRP) 10/11/2010 at 21-22.

The court also sustained Howe's objection and struck the testimony from the record when Vargas tried to repeat the statements the informant made after the controlled buy.

Q: Tell us what happened next, then, after the informant left the residence.

A: He left the residence. We followed him to another location where we were going to search him after the buy. We contacted him. He gave me a small Christmas bag. I saw that it had an envelope in it, in the bag, and I

saw what I believed to be about an ounce of methamphetamine. I asked him the circumstances, and he told me that he had bought this --

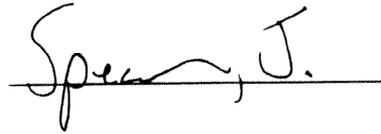
MR. THOMPSON: Objection, Your Honor. It's hearsay.

THE COURT: Sustained. The comment is stricken. The jury will disregard it.

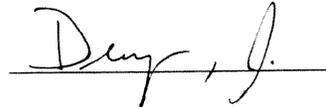
Id. at 27.

The trial court's rulings were correct. Howe's objections were sustained, any improper testimony was stricken, and the jury was instructed to disregard it. We presume the jury adhered to the court's instructions. State v. Kirkman, 159 Wn.2d 918, 155 P.3d 125 (2007). Consequently, Howe's Sixth Amendment right to confrontation was not violated.

We reverse Howe's conviction for Count I, affirm her conviction for Count II, and remand for further proceedings.

A handwritten signature in cursive script, appearing to read "Spear, J.", written over a horizontal line.

WE CONCUR:

A handwritten signature in cursive script, appearing to read "Leach, C. J.", written over a horizontal line.A handwritten signature in cursive script, appearing to read "Dwyer, J.", written over a horizontal line.