IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. CHRISTEN K. LEE, Appellant.	No. 40229-7-II UNPUBLISHED OPINION

Hunt, J. — Christen K. Lee appeals her convictions and sentences for two counts of money laundering, using criminal profiteering proceeds. She argues that (1) the trial court erred in failing to rule sua sponte that the State committed prosecutorial misconduct when it "vouched" for a confidential informant's testimony, (2) trial counsel was ineffective in failing to object to this vouching, and (3) the trial court erroneously admitted out-of-court statements under the coconspirator hearsay exception. We affirm.

Facts

I. Background

Christen Kathleen Lee was Donald Kenneth Tyler's significant other. In late 2000, Tyler negotiated the purchase of a house at 528 Puffin Avenue N.E. in Ocean Shores; four years later they purchased an adjacent lot. In January 2001, Lee alone, however, obtained a $72,750

mortgage and paid the $75,000 purchase price; Tyler's name was not on the mortgage, but he signed the Deed of Trust on Lee's behalf. Tyler and Lee lived together in this residence.

A confidential informant (CI) was acquainted with Tyler's sons, knew that Tyler was a "good marijuana grower,"[1] and gave Tyler some marijuana plants. Tyler and the CI planned that Tyler would grow the plants and then sell the crop to the CI, who would then sell the marijuana for a profit. Under this arrangement, the CI purchased 1 to 3 pounds of marijuana from Tyler in Everett on 11 occasions for special customers.[2] Although the CI never actually observed Tyler growing marijuana, the CI knew that Tyler was growing and selling high quality marijuana in Ocean Shores from as early as 2001. And when the CI gave Tyler "clips" and seeds, Tyler "grew them all." Verbatim Report of Proceedings (VRP) at 165.

Around 2004, Tyler negotiated by phone the purchase of the empty lot adjacent to Lee's Ocean Shores lot, 524 Puffin Avenue N.E. Lee personally met with the sellers to execute the sale; she paid the $15,000 purchase price with two $1,000 money orders and two cashier's checks, one for $3,000 and the other for $10,000. At some point, Tyler and Lee constructed a workshop on this empty lot.

In October 2004, with Federal Drug Enforcement Administration assistance, the Snohomish County Regional Drug Task Force arrested the CI on money-laundering charges. After his arrest, the CI began to cooperate with the Task Force and federal prosecutors by

[1] Verbatim Report of Proceedings (VRP) at 126.

[2] In response to questions about the small quantity the CI purchased from Tyler, the CI replied, "Tyler grew extremely good weed that everybody asked for . . . I had certain people that that's the only stuff they would take. They wouldn't take anything else." VRP at 129.

providing the names of and detailed information about 16 people whom the CI knew "purchased marijuana or grew marijuana"; Tyler was one of these people. VRP at 124. The Task Force began investigating each person and asked the CI "to start making phone calls, recording, wearing wires to different meetings, purchasing, doing a lot of stuff."[3] VRP at 124-25.

A. CI's Reestablished Contact with Tyler at Task Force's Direction

The Task Force began investigating Tyler in 2006. At the Task's Force request, the CI called Tyler in March 2006 and set up a meeting at Tyler and Lee's Ocean Shores residence. In May 2006, wearing no hidden recording device, the CI made his first visit to Lee and Tyler at their residence. Outside their residence, the CI observed "a pile of dirt that looked very familiar . . . just like the potting soil used . . . for growing [marijuana]." VRP at 133. Inside their residence, the CI noticed that the master bedroom smelled "like . . . the marijuana kind of after smell";[4] the CI also observed powerful lamplights and electrical ballasts, which the CI recognized as "implements for growing marijuana." VRP at 132. In a bathroom, the CI saw a particular lighting configuration commonly used for growing marijuana and noticed that a cabinet was missing, another indicator of a marijuana-growing operation. The CI did not, however, observe

[3] The CI apparently informed the Task Force that Tyler (1) was residing in Ocean Shores and where he had lived previously, (2) had been involved in growing marijuana, but (3) had ceased this growing activity in the "spring" of 2006. VRP at 60. City of Everett and Task Force Detective Tasha Townsend later testified that she did not know when Tyler had stopped growing marijuana; but, based on the CI's statements, she believed Tyler had stopped growing "[s]omewhere between March and May of 2006." VRP at 60. According to City of Everett and Task Force Detective Duane Wantland, the CI "believed that [ ]Tyler was involved in growing marijuana and that he was living in the Ocean Shores area." VRP at 180.

[4] VRP at 133.

any "actually growing marijuana plants" during this visit. VRP at 132.

Lee was in the residence during the CI's first visit; and she was actually "in the room at one time" while Tyler and the CI discussed growing and selling marijuana. VRP at 136. Lee did not, however, "jump[] in [the conversation] and talk[] about growing or selling"; and she spoke with the CI only "[v]ery briefly" during the visit. VRP at 136. Nevertheless, Tyler asked "[Lee] to verify" his marijuana-growing acumen. VRP at 155.

In August 2006, the CI and Tyler met for a second time. Again, the CI called Tyler, who "agreed to . . . provide a marijuana plant to [the CI]." VRP at 183. On the day of this second meeting, Task Force officers followed Tyler from Ocean Shores to Lee's son's residence in Marysville; they watched Tyler go inside and emerge with a "dark plastic garbage bag," which they later determined contained one or two marijuana plants. VRP at 186. Later that same day, Tyler delivered the marijuana plants to the CI at a Marysville restaurant.

In October 2006, Tyler and the CI met again for a third time—at Tyler and Lee's Ocean Shores residence; this time the CI was wearing a wire. During this visit, the CI made mostly the same observations that he had made during his first visit; as before, he observed no marijuana plants inside the residence. When the CI and Tyler had a "conversation about marijuana selling [and] growing," again Lee "was in the room"; she "might have responded" once during the conversation. VRP at 140-41. Tyler had previously expressed an interest in selling the Ocean Shores residence to the CI as an "investment property" for the CI to use to grow marijuana, with Tyler getting paid to serve as some "sort of an advisor to such an operation." VRP at 156, 158. When the CI asked Tyler what he wanted to do with the residence, Tyler talked about "selling the

house the way it was to [CI] or anybody that [CI] might know that would be interested in just taking it over." VRP at 168. When the CI left, Tyler gave him some marijuana seeds.

B. Task Force's Financial Investigation

Meanwhile, Detective Townsend had begun a financial investigation of Tyler's "household," which included both Tyler and Lee. VRP at 435. Townsend learned that (1) between 1994 and 2006, Tyler had been employed for a total of only two and a half years (1995 through 1998); (2) between 2003 and 2005, Tyler had not had any bank accounts in his name and he had received no income from any identifiable source; (3) Lee had reported no earnings from an employer since 2002, when she had suffered a job-related injury and was unable to continue working; (4) from 2003 through 2005, Lee had received approximately $110,000 in Social Security and disability benefits and an additional $13,000 from "known" sources[5]; (5) Lee had two bank accounts, one of which received most of her disability benefits deposits; and (6) in 2004 and 2005, Lee had obtained $23,000 in cash advances on credit cards.

Townsend was unable to locate any documentation that Tyler had engaged in "legitimate employment" between 2003 and 2005, had received any significant casino winnings, income from the sale of personal or real property, gifts from friends or relatives, or an inheritance. VRP at 479. Yet Townsend also found that Lee and Tyler had spent approximately $275,000 between 2003 and 2005, roughly $129,000 more than Lee's identifiable income during that period, when Tyler had no identifiable income. Townsend also learned that Lee and Tyler's Ocean Shores

[5] VRP at 463. These "known" sources included personal checks from Lee's son and other people, refunds, and rebates.

residence mortgage payments, credit card payments, utility bills,[6] and other "monthly obligations" and "daily living expenses"[7] were being paid, "for the most part," with cash or money orders, which did not originate from either of Lee's bank accounts. VRP at 351.

At the end of 2005, however, Lee and Tyler's spending and payment patterns changed, contemporaneously with Tyler's ceasing his marijuana-growing activities, according to the CI. Similarly, around the time "when the marijuana grow operation ceased . . . , kilowatt hour usage . . . tapered off." VRP at 197. In December 2005, for example, the Ocean Shores residence mortgage payment was made with a personal check drawn on one of Lee's bank accounts. And there was a larger "shift in how the payments were being made" on credit cards, utility bills, and other monthly obligations and daily living expenses: Expenses and bills were being paid with personal checks drawn on one of Lee's bank accounts instead of with cash and money orders. VRP at 355. In June 2006, the balance of the Ocean Shores residence mortgage was paid off with a personal check drawn on one of Lee's bank accounts.

C. Search Warrant for Ocean Shores Properties

In December 2006, the Task Force executed a search warrant at Tyler and Lee's two Ocean Shores addresses, including the residence and the workshop. In the workshop they discovered more than three ounces of marijuana and United States currency. They found Tyler and Lee inside the residence, where they also observed "indoor [marijuana] growing equipment, sitting idle in the upstairs," including special lighting systems, electrical ballasts, "hundreds" of

[6] The electricity bill for the Ocean Shores workshop was in Lee's son's name.

[7] VRP at 380.

planting pots, potting soil, exhaust fans, metal hangers generally used for drying marijuana, and thermometers. VRP at 52, 198. Inside the residence, the Task Force also found a small amount of leftover marijuana, "gardening scissors"[8] with "green sticky residue"[9] on them that "smelled like fresh marijuana,"[10] and $58,303 in United States currency in the shop. Townsend's "main function was to go through and collect every piece of paper that had some kind of financial implication to it"[11]; she discovered about a hundred money order receipts and other documents, from which she gleaned information that she incorporated into her financial investigation.

That same December 2006 day, the Task Force simultaneously executed a search warrant at Lee's son's Marysville house, from which Tyler had emerged with two marijuana plants in a large garbage bag a few months earlier, in August 2006. Inside Lee's son's Marysville house, the Task Force discovered an "active marijuana growing operation" with 26 marijuana plants. VRP at 296.

[8] VRP at 238.

[9] VRP at 244.

[10] VRP at 238.

[11] VRP at 377.

II. Procedure

Following a mistrial three years later, on August 13, 2009, the State amended its information and charged Lee[12] with two counts of using criminal profiteering proceeds under RCW 9A.82.080(2)(a).[13] The first count alleged that from August 1, 2002 through November 30, 2005, Lee used money laundering ("a pattern of criminal profiteering") to obtain an interest in "Grays Harbor County Tax Parcel #090500029000 located in Ocean Shores, Washington."[14] CP at 27. The second count alleged that from March 1, 2004 through March 31, 2004, Lee used money laundering to obtain an interest in "Grays Harbor County Tax Parcel #090500028900 located in Ocean Shores, Washington."[15] CP at 28.

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[12] That same day, a jury was unable to reach a verdict and the trial court declared a mistrial in *State of Washington v. Christen K. Lee*, Grays Harbor Superior Court cause number 08-1-00372-1, an earlier trial in the same cause number involved in the instant appeal. *See* CP at 88.

[13] RCW 9A.82.080(2)(a) provides, "It is unlawful for a person knowingly to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property through a pattern of criminal profiteering activity."

[14] This parcel contained the residence that Lee purchased in January 2001. The Grays Harbor County Treasurer's Office Online Parcel Database shows that this parcel had a street address of 528 Puffin Avenue Northeast in Ocean Shores; and it lists Lee as the owner. Grays Harbor County Treasurer's Office Online Parcel Database Tax Information, available at http://www.co.grays-harbor.wa.us/gh_parcel/Search/DetailParcelTax.asp?SrchParcelNo=090500029000 (last visited April 16, 2011).

[15] Lee purchased this parcel in 2004 and later built his workshop on it. The Grays Harbor County Treasurer's Office Online Parcel Database shows that this parcel has a street address of 524 Puffin Avenue Northeast in Ocean Shores and lists Lee as the owner. Grays Harbor County Treasurer's Office Online Parcel Database Tax Information, available at http://www.co.grays-harbor.wa.us/gh_parcel/Search/DetailParcelTax.asp?SrchParcelNo=090500028900 (last visited April 16, 2011).

At the retrial, the CI and other Task Force officers testified as set forth above. During cross-examination, Lee questioned the CI about his agreement with the Task Force to provide drug-related information in exchange for leniency and about whether the information he had provided about Tyler had been current and accurate. On redirect, the State followed up on this line of questioning by eliciting, for the first time, the CI's motivation for cooperating with the Task Force, including "the threat of a long prison sentence," as well as the CI's motivation to be truthful. VRP at 169. Lee neither objected to this questioning and testimony nor moved for a mistrial on grounds of improper vouching.

Townsend testified in detail about her financial investigation of Lee and Tyler. Townsend believed that "dirty money" from the Ocean Shores marijuana-growing operation had made up the difference between Tyler and Lee's 2003 to 2005 expenditures ($275,000) and Lee's income during that same period ($146,000). VRP at 475.

Under the coconspirator hearsay exception, the State offered audio recordings of conversations between the CI and Tyler during the CI's second visit to Lee and Tyler's Ocean Shores residence. Lee objected, arguing that the State had not presented "adequate proof of a conspiracy" between her and Tyler, a predicate to admitting the recorded conversation under the coconspirator exception. VRP at 317. Noting that one could make reasonable inferences from the circumstantial evidence that there was an ongoing conspiracy, the trial court admitted the recorded conversations under the coconspirator hearsay exception.

The jury found Lee guilty of both counts. The trial court sentenced her to concurrent 90-day confinements for each conviction and a total of 12 months of community custody for both

convictions. Lee appeals.

Analysis

I. Prosecutorial Misconduct

Lee first argues that, on redirect examination, the State improperly vouched for the CI's credibility and that this vouching constituted prosecutorial misconduct.[16] We disagree.

A. Standard of Review

To establish prosecutorial misconduct, generally a defendant must prove only that the prosecutor's conduct was improper and that it prejudiced his right to a fair trial by establishing a substantial likelihood that the misconduct affected the jury's verdict. *State v. Jackson*, 150 Wn. App. 877, 882-83, 209 P.3d 553, *review denied*, 167 Wn.2d 1007 (2009). But where, as here, a defendant failed to object to the alleged misconduct at trial, she has waived the prosecutorial misconduct issue on appeal "unless the misconduct was 'so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (quoting *State v.*

[16] Lee's brief of appellant contains the following caption preceding the section purporting to address this vouching issue: "The trial court erred in failing to declare a *mistrial* due to the prosecutor's improper and impermissible questioning of [the CI]." Br. of Appellant at 8 (emphasis added). This caption, however, merely mentions a mistrial; nowhere in her brief does Lee set forth the criteria for declaring a mistrial, explain how her case met these criteria, argue why the prosecutor's alleged misconduct was "'so flagrant and ill-intentioned'" that the trial court committed reversible error in failing to declare a mistrial sua sponte, or even attempt to show how the alleged misconduct "'evince[d] an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury.'" *State v. Weber*, 159 Wn.2d 252, 270, 149 P.3d 646 (2006) (quoting *State v. Stenson*, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)) . Moreover, "[w]e do not review issues inadequately briefed or mentioned in passing." *State v. Donaghe*, 172 Wn.2d 253, 263 n.11, 256 P.3d 1171 (2011) (citing *State v. Thomas*, 150 Wn.2d 821, 868-69, 83 P.3d 970 (2004)). Therefore, we do not further consider Lee's assertion that the trial court erred in failing to declare a mistrial.

Stenson, 132 Wn.2d 668, 719, 940 P.2d 1239 (1997)). Because Lee failed to object below, she must meet this higher standard; but she does not.

B. Vouching

Whether a witness has testified truthfully is for the jury to determine. *State v. Ish*, 170 Wn.2d 189, 196, 241 P.3d 389 (2010) (plurality opinion) (citing *United States v. Brooks*, 508 F.3d 1205, 1210, (9th Cir. 2007)). "It is improper for a prosecutor personally to vouch for the credibility of a witness." *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995) (citing *State v. Sargent*, 40 Wn. App. 340, 344, 698 P.2d 598 (1985)). Nevertheless, a prosecutor has reasonable latitude to draw inferences from the evidence, including inferences about witness credibility. *State v. Smith*, 162 Wn. App. 833, 849, 262 P.3d 72 (2011), *review denied*, 173 Wn.2d 1007 (2012).

Vouching may also take the form of the State's questioning a witness about his agreement with the State to testify truthfully. *Smith*, 162 Wn. App. at 849. Washington cases that have deemed such questioning to be vouching have involved (1) the State's questioning a witness, about his agreement with the State, on *direct* examination, not on redirect; (2) the defendant's timely objection to such questioning during trial; or (3) both. *State v. Green*, 119 Wn. App. 15, 22-24, 79 P.3d 460 (2003); *Ish*, 170 Wn.2d at 195-201 (plurality opinion); *Smith*, 162 Wn. App. at 848-51. Here, unlike in *Green*, *Ish*, and *Smith*, the State did not question the CI about his motivation to be truthful until redirect—*after* Lee had first cross-examined the CI about his cooperation with the Task Force. Furthermore, unlike *Green* and *Ish*, Lee did not timely object below; therefore, she has the heavy burden of showing that the alleged misconduct was so "'flagrant and ill-intentioned'" that it created "'an enduring and resulting prejudice that could not

have been neutralized by an admonition to the jury.'" *Weber*, 159 Wn.2d at 270 (quoting *Stenson*, 132 Wn.2d at 719).

In *Ish*, for example, a plurality of our Supreme Court[17] explained, "Evidence that a witness has promised to give 'truthful testimony' in exchange for reduced charges . . . is generally self-serving, irrelevant, and *may amount to vouching*, particularly if admitted during the State's case in chief." *Ish*, 170 Wn.2d at 198 (plurality opinion) (emphasis added). The *Ish* plurality also explained, however, that when

> [a] defendant . . . impeach[es] a witness on cross-examination by referencing any agreements or promises made by the State in exchange for the witness's testimony[,] the State is entitled to point out this fact [that the agreement contains provisions requiring the witness to give truthful testimony] on redirect.

170 Wn.2d at 198-99 (plurality opinion). The separate concurring opinion in *Ish* (1) agreed with the plurality that on *redirect* the State is permitted to question a witness about his promise to testify truthfully if the defendant has impeached the witness on cross-examination about that promise; and (2) would allow the State to inquire about a witness's truthful-testimony promise even on *direct*, in order to "'pull the sting' from the anticipated cross examination" about the witness's cooperation with the State. *Ish*, 170 Wn.2d at 202 (Stephens, J., concurring). Thus, a

[17] The four plurality justices reasoned that the State's questioning of a witness on *direct* examination, about his promise to testify truthfully in exchange for reduced charges, was erroneous because the testimony was "irrelevant and had the potential to prejudice the defendant by placing the prestige of the State behind [the witness's] testimony." *Ish*, 170 Wn.2d at 199 (plurality opinion). Nonetheless, the plurality concluded that this error was harmless and, thus, voted to affirm Ish's conviction. *Ish*, 170 Wn.2d at 200-01 (plurality opinion). The four separately concurring justices agreed with affirming Ish's conviction, but they concluded that the State's questioning was not error because its prejudicial effect did not substantially outweigh its probative value. *Ish*, 170 Wn.2d at 201-06 (Stephens, J., concurring).

majority of our Supreme Court in *Ish* has agreed that the State's questioning of a witness about his promise to testify truthfully in exchange for reduced charges is proper if the defendant attempts during cross-examination to impeach the witness about the agreement.

Two critical facts distinguishing *Ish* underscore the lack of reversible error here: First, in *Ish*, the State conducted the "vouching" on *direct* examination, without Ish's having first attempted to impeach the witness; it was the State's initiating the subject that the plurality in *Ish* concluded was erroneous. Here, in contrast, the State did not vouch for the CI's credibility on direct; on the contrary, only *after* Lee cross-examined the CI about his bargain with the State and suggested that the CI was lying to receive a shorter prison term did the State elicit additional, and more accurate, details about this arrangement on *redirect*. Second, and equally as important, Ish objected at trial to the prosecutorial misconduct; Lee did not. Nevertheless, although Ish did not have to meet the higher standard of review that Lee must meet here, a majority of the Supreme Court did not conclude that even the State's "anticipatory" alleged vouching on *direct* warranted reversal of Ish's conviction. If *Ish* did not warrant reversal, surely reversal is not warranted here.

During cross-examination, Lee attempted to impeach the CI about his plea agreement with the State and questioned the accuracy of his memory. Lee asked the CI, "What was it that was being held over your head that induced you to give information to the Snohomish County Drug Task Force?"; the CI responded, "A lot of time in prison." VRP at 147. Lee then asked the CI, "[I]t was not too tough a decision to go ahead and say I'm going to give [the Task Force] all the information I can, right?" VRP at 150. Lee also questioned the CI about "how old [the CI's] information about [ ] Tyler was," suggesting that the CI was "not good with the dates" and may

have provided the Task Force with information about Tyler that was "four or five years old," thus, calling into question the weight, accuracy, and truthfulness of the CI's testimony. VRP at 152. In addition, Lee's trial counsel also made side comments about the CI's inability to remember dates, suggested that the CI's recollection was faulty, and insinuated that the CI's testimony and/or the information provided to the Task Force contained inaccuracies.

Although not a direct accusation that the CI was fabricating information about Tyler in order to obtain reduced charges and a shorter sentence, counsel's comments and Lee's cross-examination of the CI were direct attacks on the his "poor memory," sufficient to constitute impeachment and to invite rehabilitation on redirect and redirect questioning of the CI about the CI's motivation to be truthful, without constituting improper vouching.[18] *See State v. Froehlich*, 96 Wn.2d 301, 305-06, 635 P.2d 127 (1981). Accordingly, such redirect here was not improper.

We hold, therefore, that Lee fails to sustain her burden, necessary to raise prosecutorial misconduct for the first time on appeal, because she has not shown that the State's conduct on redirect was either flagrant and ill-intentioned or that it evinced an enduring and resulting prejudice. Moreover, she was the party who introduced this line of questioning on cross-examination, thereby entitling the State to rehabilitate its witness on redirect under *Ish*.

[18] Lee's reliance on *Green* is misplaced. In *Green*, Division One held that the trial court erred in allowing the State to introduce on *direct* examination an immunity agreement between a witness and the State that contained the witness's promise to testify truthfully. *Green*, 119 Wn. App. at 22-23. Here, in contrast, the State did not reference the CI's plea agreement until *redirect* examination, *after* Lee had first questioned the CI about the existence of the agreement. Moreover, unlike Lee, who failed to preserve this prosecutorial misconduct issue for appeal, Green preserved the prosecutorial misconduct issue by objecting below; thus, even if *Ish* had "confirmed" the holding in *Green*, as Lee claims, *Green* would not apply here. Br. of Appellant at 9.

C. Effective Assistance of Counsel

In a related argument, Lee argues that her trial counsel was ineffective in failing to object to the State's improper vouching for the CI's credibility on redirect. To succeed on an ineffective assistance of counsel claim, the defendant bears the burden of showing both that (1) trial counsel's performance was deficient and (2) trial counsel's deficient performance prejudiced her. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011).

We have already held that the State did not engage in any vouching; accordingly, we also hold that Lee's trial counsel's performance was not deficient when he did not object to the State's redirect rehabilitation of the CI. Because Lee fails to meet the first prong of the ineffective assistance of counsel test, deficient performance, we need not address the second prong, prejudice. Therefore, Lee's ineffective assistance of counsel argument fails.

II. Coconspirator Hearsay Exception, ER 801(d)(2)(v)

Next, Lee argues that the trial court abused its discretion by admitting, under ER 801(d)(2)(v), audio recordings of coconspirators Tyler and the CI's conversations about marijuana growing and selling. Lee asserts that these coconspirator statements were inadmissible because the State failed to establish that she and Tyler were members of a conspiracy under RCW 9A.28.040(1) and to show that the CI's statements were made "during the course and in furtherance of [a] conspiracy." Br. of Appellant at 16 (quoting ER 801(d)(2)(v)). Again, we disagree.

A. Standard of Review

We review de novo the trial court's interpretation of the rules of evidence; we review for

abuse of discretion the trial court's application of the rules to particular facts. *State v. Sanchez-Guillen*, 135 Wn. App. 636, 642, 145 P.3d 406 (2006). A trial court abuses its discretion only where no reasonable person would take the view that the trial court adopted. *State v. Atsbeha*, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). We find no abuse of discretion here.

Although hearsay is generally inadmissible, ER 801(d)(2)(v) allows admission of "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." ER 801(d)(2)(v); *Sanchez-Guillen*, 135 Wn. App. at 642. As a predicate to such admission, the State must show (1) a "'prima facie case of conspiracy,'" and (2) that the statements were made "'during the course and in furtherance of the conspiracy.'" *State v. St. Pierre*, 111 Wn.2d 105, 118, 759 P.2d 383 (1988) (quoting *State v. Dictado*, 102 Wn.2d 277, 284, 687 P.2d 172 (1984)); ER 801(d)(2)(v)). It is the ongoing existence of such a conspiracy that Lee challenges here.

B. Prima Facie Showing of Conspiracy

Lee argues that the State failed to establish the existence of a conspiracy by failing to prove all the "essential elements" of RCW 9A.28.040(1). Br. of Appellant at 15 (quoting *State v. Moavenzadeh*, 135 Wn.2d 359, 364, 956 P.2d 1097 (1998)). The coconspirator exception to the hearsay rule, however, is not synonymous with the crime of conspiracy; thus, to establish a prima facie[19] conspiracy for purposes of admitting coconspirator statements, the State need not make a prima facie showing of *each element of the crime* of conspiracy. *State v. Halley*, 77 Wn. App. 149, 153-54, 890 P.2d 511 (1995). Rather, "the proof required to justify admission is that which,

[19] We further note that establishing a "prima facie case" requires a smaller quantum of evidence than does the "preponderance of the evidence" standard. *See State v. Riley*, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993).

in the opinion of the trial court, establishes or *tends* to establish the fact of the conspiracy." *State v. Culver*, 36 Wn. App. 524, 528, 675 P.2d 622 (1984) (citing *State v. McGonigle*, 144 Wash. 252, 258, 258 P. 16 (1927)). Accordingly,

> the State need establish no more than the basic dictionary definition of a conspiracy, 'an agreement . . . made by two or more persons confederating to do an unlawful act'. . . regardless of the crime charged.

Halley, 77 Wn. App. at 154 (some alterations in original) (quoting Webster's Third New International Dictionary 485 (1969)).

To provide a foundation for offering coconspirator statements under ER 801(d)(2)(v), the State must establish a "logical and reasonable deduction"[20] that there was already an ongoing agreement between Tyler and Lee, "confederating to do an unlawful act"[21] before they made the challenged statements. The evidence need support only a "'logical and reasonable deduction'" of the conspiracy. *Riley*, 121 Wn.2d at 32 (quoting *Hamrick*, 19 Wn. App. at 419). It is not necessary to show a formal agreement; instead, such evidence may be circumstantial. *State v. Whitaker*, 133 Wn. App. 199, 223, 135 P.3d 923 (2006).

Here, the State presented sufficient evidence to establish a "logical and reasonable" deduction that there were two ongoing conspiracies between Tyler and Lee: (1) growing and selling marijuana and (2) money laundering. *Riley*, 121 Wn.2d at 32 (quoting *Hamrick*, 19 Wn. App. at 419). The State needed to establish only one of these two conspiracies to satisfy its burden to establish a prima facie conspiracy for purposes of admitting the coconspirator

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[20] *State v. Riley*, 121 Wn.2d 22, 32, 846 P.2d 1365 (1993) (quoting *State v. Hamrick*, 19 Wn. App. 417, 419, 576 P.2d 912 (1978)).

[21] *Halley*, 77 Wn. App. at 154 (quoting Websters at 485).

statements. Nevertheless, the record shows that the State sufficiently established not only one, but two such conspiracies.

1. Ongoing marijuana growing and selling conspiracy

The following evidence introduced at trial supported the reasonable deduction that Tyler and Lee had an ongoing agreement to manufacture and to distribute marijuana during 2006 before, during, and after the recorded conversations between Tyler and the CI:[22] Lee owned the Ocean Shores residence in which she lived with Tyler and which obviously had been set up for growing marijuana sometime before the CI's May 2006 visit.[23] During this visit, Lee had been at the Ocean Shores residence and present in the room in which the CI and Tyler discussed growing and selling marijuana and Tyler told Lee to "verify" to the CI Tyler's marijuana-growing prowess. VRP at 155.

Three months later, in August 2006, the Task Force observed Tyler give the CI two marijuana plants that he had earlier retrieved from Lee's son's residence. Two months later, in October 2006, Lee was again present in the Ocean Shores residence and in the room when Tyler and the CI talked about converting Lee's property into a marijuana-growing operation.

And two months later, in December 2006 when the Task Force executed the search warrant, they found in excess of three ounces of marijuana and large amounts of United States

[22] Despite the CI's apparently having told Townsend that Tyler had ceased growing marijuana in spring 2006, the CI never so testified at trial. But the CI did testify at trial that at some point he had stopped dealing with Tyler and that the CI had "turned [his] business over to [another gentleman, who] was dealing with [Tyler]." VRP at 153. Thus, contrary to Townsend's belief, there is no evidence in the record before us on appeal that Tyler had stopped growing marijuana.

[23] As previously described in the Facts section of this opinion, during this May 2006 meeting, the CI detected a "marijuana kind of after smell" in the master bedroom, which "smelled in there like it had been a grow room." VRP at 133. He also observed "implements for growing marijuana," such as powerful lamplights, electrical ballasts, and potting soil typically associated with marijuana growing. VRP at 132.

currency in Lee and Tyler's workshop on her Ocean Shores property. When they searched the Ocean Shores residence, the Task Force also observed strong indications that it was capable of supporting an ongoing marijuana-growing operation: hundreds of pots, wiring systems, indoor growing equipment, ballasts, clipping and gardening shears with a residue consistent with marijuana leaves and smelled like fresh marijuana, potting soil, exhaust fans, light systems, and hangers typically used for drying marijuana These facts support a "logical and reasonable deduction" that Tyler and Lee had an ongoing agreement and were conspiring to manufacture and to distribute marijuana. *Riley*, 121 Wn.2d at 32 (quoting *Hamrick*, 19 Wn. App. at 419).

2. Ongoing money laundering conspiracy

Similarly, the following facts (some of which also established the marijuana growing and selling conspiracy) support the reasonable deduction that Tyler and Lee had an agreement to launder money: In October 2006, Lee was present when Tyler talked to the CI about purchasing Lee's house as a "turnkey operation [to] start a good profitable marijuana grow operation." VRP at 157. Law enforcement found marijuana in Lee's residence and $58,000 in cash and over three ounces of marijuana in Tyler and Lee's workshop next door. Det. Duane Wantlund testified that a marijuana growing operation of the scale and type observed in Lee and Tyler's's residence and workshop could generate $150,000 annually.

Furthermore, given that Tyler and Lee had previously spent substantially more than their identifiable household income, their recent income and expenditure history provided strong inferences of their intent to launder drug proceeds. Detective Townsend presented evidence that between 2003 and 2005, Tyler and Lee had spent about $275,000, even though they had only

$146,357 in income that the Task Force could trace. And it was undisputed that almost all of the mortgage payments on Lee's house were made in cash or money orders, which did not originate from either of Lee's bank accounts. We agree with the State that "[t]he trial court could infer that this money was proceeds of drug sales and that it was intended for ultimate expenditure or investment," which constituted "money laundering" of the marijuana sales proceeds under RCW 9A.83.020(1)(a). Br. of Resp't at 17.

Taking the evidence in the light most favorable to the State, post verdict, we hold that the State presented sufficient evidence to establish a "logical and reasonable" deduction of two ongoing conspiracies between Tyler and Lee—growing and selling marijuana and money laundering—to support the trial court's exercise of its discretion to admit Tyler's coconspirator statements against Lee under ER 801(d)(2)(v). *Riley*, 121 Wn.2d at 32 (quoting *Hamrick*, 19 Wn. App. at 419).

C. CI's Statements "During the Course and In Furtherance of the Conspiracy"

Lee also contends that the audio recordings of coconspirators Tyler and the CI's marijuana growing and selling conversations were not made "'during the course and in furtherance of the conspiracy'" and that her presence during these conversations is of no consequence. Br. of Appellant at 16 (quoting ER 801(d)(2)(v)). We disagree.

Courts generally interpret the "in furtherance" requirement broadly. *State v. Baruso*, 72 Wn. App. 603, 615, 865 P.2d 512 (1993). For example, in *State v. King*, 113 Wn. App. 243, 281 n.11, 54 P.3d 1218, (2002), Division One of our court held that the defendant's mere presence during a conversation about a robbery "strongly indicat[ed] that [the defendant] was involved to

some extent in the conversation." Division One further stated that even if the defendant had been silent, his "acquiescence [was] enough in such circumstances to impute the statement to him as an admission." *King*, 113 Wn. App. at 281 n.11.

Similarly here, Lee's presence during the October 2006 conversations between the CI and Tyler about selling and growing marijuana and starting a marijuana growing operation sufficed to establish her involvement in an ongoing conspiracy to grow and to sell marijuana or to launder money. The record also establishes that these conversations took place during the CI's October 2006 visit to Tyler and Lee's Ocean Shores residence and that this visit was both preceded and followed by events showing that the conspiracy was ongoing at the time of these conversations. For example, (1) before the CI's October 2006 visit, Tyler had expressed an interest in selling Lee's Ocean Shores residence to the CI to use for growing marijuana; (2) in May 2006, again before the CI's October 2006 visit, Tyler had provided the CI with two marijuana plants from Lee's son's house; (3) as the CI was leaving Lee's Ocean Shores residence after the October 2006 visit, Tyler gave the CI some marijuana seeds, which, the jury could reasonably infer, the CI would use to grow marijuana; and (4) in December 2006, shortly after the CI's October visit, the Task Force found at Lee's Ocean Shores residence—marijuana, United States currency, and a "grow room" "fully set up for growing marijuana" with hundreds of pots, wiring systems, indoor growing equipment, ballasts, clipping and gardening shears that smelled like fresh marijuana, potting soil, exhaust fans, light systems, and hangers typically used for drying marijuana. VRP at 49.

This evidence establishes a "logical and reasonable deduction" that Lee and Tyler had an

ongoing conspiracy to grow and sell marijuana and an ongoing conspiracy to launder money at the time of the CI's and Tyler's conversations recorded in October 2006. *Riley*, 121 Wn.2d at 32 (quoting *Hamrick*, 19 Wn. App. at 419). Accordingly, we hold that the trial court did not err in finding the existence of an ongoing conspiracy and in admitting these recorded conversations as non-hearsay coconspirators statements under ER 801(d)(2)(v).[24]

We affirm.

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 pursuant to RCW 2.06.040, it is so ordered.

Hunt

I concur:

Quinn-Brintnall, J.

I concur in result only:

Armstrong, P.J.

[24] We note that these coconspirator statements might also have been admissible as exceptions under ER 404(b) to the extent that Tyler and Lee's dealings before the CI and Tyler's recorded October 2006 conversations tended to prove Lee's and Tyler's motive, intent, and knowledge to engage in either of these two conspiracies. But neither party addresses this theory of admissibility on appeal; nor did the trial court address it below. Therefore, although we can affirm the trial court on any alternate grounds that the record supports, we do not consider this rationale at this time. "[A]n appellate court may sustain a trial court on any correct ground, even though that ground was not considered by the trial court." *Nast v. Michels*, 107 Wn.2d 300, 308, 730 P.2d 54 (1986) (citing *Reed v. Streib*, 65 Wn.2d 700, 709, 399 P.2d 338 (1965)); *see also State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2004).