No. 97666-0
(COA No. 35805-4-III)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BLAKE ZAHN,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court

Washington Court of Appeals

United States Supreme Court

Other Cases

Washington Constitution

United States Constitution

Rules

A. IDENTITY OF PETITIONER

Blake Zahn petitions this Court for review of the Court of Appeals decision terminating review in *State v. Zahn*, No. 35805-4-III, filed July 9, 2019, for which reconsideration was denied on August 20, 2019. RAP 13.1(a), 13.3(a)(1), 13.4(b). A copy of the opinion and the order are attached in the Appendix.

B. COURT OF APPEALS DECISION

A jury convicted Mr. Zahn of possession of a controlled substance after the court violated Mr. Zahn's right to counsel by forcing him to proceed pro se without an unequivocal request and without conducting a timely colloquy to ensure a knowing and voluntary waiver. The Court of Appeals rejected Mr. Zahn's challenge and found both an unequivocal waiver and an adequate colloquy. However, the Court failed to recognize that Mr. Zahn had already been appearing pro se by the time the court engaged in the colloquy and that the court failed to ensure Mr. Zahn knowingly and voluntarily waived his right to counsel at the time it declared he was proceeding pro se.

In addition, the State violated Mr. Zahn's right to remain silent when a witness informed the jury Mr. Zahn "didn't want to talk" in response to post-arrest police questioning and when the prosecutor informed the jury Mr. Zahn "declined to really say anything" when he was

questioned while in custody. Although the Court of Appeals properly found the State twice commented on Mr. Zahn's constitutional right to silence, it misapplied the relevant legal standard and found this constitutional error harmless.

Finally, the court impermissibly commented on the evidence when the court told the jury the evidence was "drugs," "actual drugs," "contraband," and "harmful substances." The Court of Appeals correctly found these statements to be unconstitutional comments on the evidence and acknowledged the multiple impermissible comments "had the likely effect of suggesting to the jury that they need not consider whether the State proved Zahn possessed heroin because the trial court clearly believed the exhibits were drugs." It nonetheless found the multiple improper comments harmless because of a misplaced reliance on the standard jury instructions.

C. ISSUES PRESENTED FOR REVIEW

1. The Sixth and Fourteenth Amendments and Article I, Sections 3 and 22 require courts to apply a strong presumption against the waiver of the right to counsel and may permit an individual to proceed pro se only where he or she makes an unequivocal request and where the court has determined the person is knowingly, intelligently, and voluntarily waiving the right to counsel. Here, the court relieved appointed counsel and

declared Mr. Zahn was representing himself at the first court appearance after a comment of frustration from Mr. Zahn, without an unequivocal request. Should this Court grant review and find the trial court violated Mr. Zahn's rights to counsel and due process when it forced Mr. Zahn to proceed pro se without an unequivocal request, contrary to this Court's precedent?

2. At the time that the court relieved appointed counsel and declared Mr. Zahn was proceeding pro se, the court did not ask Mr. Zahn any questions or conduct any inquiry into whether Mr. Zahn was knowingly, intelligently, and voluntarily waiving his right to counsel. Only two court appearances later, after Mr. Zahn had been representing himself for two weeks, did the court finally question Mr. Zahn about giving up his right to counsel and engage in a colloquy. Should this Court accept review and hold that a belated colloquy weeks later fails to ensure that a defendant knowingly, intelligently, and voluntarily waived his right to counsel at the time he begins to proceed pro se and violates the constitutional right to counsel?

3. The Fifth Amendment and Article I, Section 9 encompass a right to remain silent which individuals may invoke at any time, and the State may not urge the jury to draw an adverse inference from the exercise of this right. Here, the prosecutor stated in his opening statement and a

police witness testified that Mr. Zahn invoked his right to silence while being questioned after he received *Miranda*[1] warnings. Should this court accept review because the Court of Appeals erred in focusing on the evidence of guilt instead of whether the admittedly unconstitutional comments contributed to the verdict?

4. Article IV, Section 16 prohibits courts from commenting on the evidence, and this Court has repeatedly held such comments are presumed to prejudice the defendant. Here, the Court of Appeals found that the trial court's comments to the jury referring to the exhibits as "drugs," "actual drugs," "contraband," and "harmful substances" were impermissible comments on the evidence and "had the likely effect of suggesting to the jury that they need not consider whether the State proved Zahn possessed heroin because the trial court clearly believed the exhibits were drugs," but nonetheless found the error harmless because pro se Mr. Zahn conducted a "limited and largely ineffective" cross examination and because the jury instructions cured any error. Should this Court grant review and hold judicial comments on the evidence are not deemed harmless simply because the court otherwise properly instructs the jury?

[1] *Miranda v. Arizona*, 384 U.S. 436, 8 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

D. STATEMENT OF THE CASE

Police arrested Mr. Zahn for driving with a suspended license following a traffic stop. CP 18, 41. While Mr. Zahn was in jail on the driving matter, officers discovered heroin on his person and in his property. RP 175-78, 181-84. Sergeant Arnold read Mr. Zahn his *Miranda* rights and asked him whether he brought the heroin into jail with him or acquired it while in jail. RP 142-43. Mr. Zahn responded that he brought it in and then told Sergeant Arnold he did not want to talk to him anymore. RP 143. Mr. Zahn was subsequently charged with possession of a controlled substance. CP 59-60.

At the first court appearance, defense counsel informed the court that Mr. Zahn "wishes to represent himself." RP 5. Mr. Zahn stated, "I just don't feel that I can fully trust um my attorney and um I would like to represent myself in this matter." RP 6. The court made no inquiry of Mr. Zahn regarding self-representation at any time during the court appearance. RP 5-8. Instead, the court immediately relieved appointed counsel and announced Mr. Zahn was representing himself. RP 6-8. The court ended the hearing by declaring, "Mr. Wargin [appointed defense counsel] will withdraw, the Court's approved. Defendant is representing himself pro se. [inaudible]." RP 8. The court then adjourned the case one

week for arraignment. RP 7-8. Counsel filed a written Notice of Withdrawal before the next court date. CP 61.

At the following court appearance, Mr. Zahn immediately made clear his intent not to proceed pro se but to secure representation through an attorney. Mr. Zahn stated, "I'm currently saving money to have someone defend me, but I just hadn't --- haven't met that mark yet. I should this week and so I was gonna ask for a week continuance." RP 11. The court inquired, "Have you made contact with a lawyer?" and "[Y]ou've discussed what the necessary fees are?" both to which Mr. Zahn replied, "Yes, sir." RP 11-12. Mr. Zahn then reiterated his request for time to secure counsel. "I get paid on Tuesday and uh at that time I --- I should have enough money to have him represent me or defend me." RP 12. Before adjourning the case, the court reiterated, "And the purpose for that continuance would be to make final arrangements with your private counsel, is that correct?" to which Mr. Zahn replied, "Yes, sir." RP 12. At no time did the court ask Mr. Zahn whether he was knowingly and voluntarily waiving his right to counsel.

At his third court appearance, Mr. Zahn alerted the court he had secured representation by a special master. RP 16. After determining that person was not an attorney licensed to practice in Washington, the court rejected that option. RP 16-18. Rather than adjourn for Mr. Zahn to retain

private counsel, appoint new counsel for Mr. Zahn, or inquire as to whether Mr. Zahn intended to proceed pro se, the court sua sponte launched into a colloquy.

The court told Mr. Zahn he had a right to represent himself. RP 17. At that point, Mr. Zahn did not request to represent himself. RP 17. The court then inquired into Mr. Zahn's education, prior experiences with self-representation, his understanding of the charges and penalties, and his constitutional rights. All of this occurred without any request to proceed pro se. RP 17-23.

After the colloquy, the court again informed Mr. Zahn of the right to self-representation without an unequivocal request from Mr. Zahn. RP 23. It is only towards the end of the colloquy, and again without a request from Mr. Zahn, that the court asked, "Is it your intent to go forward and represent yourself or are you asking the Court to appoint an attorney that's authorized to practice in the State of Washington?" RP 24. Mr. Zahn acquiesced, responding, "It's my intent . . . [t]o go forward and represent myself, Your Honor." RP 24. The court then made additional inquiries and ultimately concluded the colloquy and found Mr. Zahn "knowingly and willingly and intelligently" waived his right to counsel. 24-26.

The entire trial lasted a single day. RP 61-239. In his opening statement, the prosecutor informed the jury that, while Mr. Zahn was

being questioned by Sergeant Arnold, "The defendant declined to say really anything further about the event." RP 127. In addition, in response to questioning about his interrogation of Mr. Zahn, Sergeant Arnold testified, while he was questioning Mr. Zahn and after advising him of his *Miranda* rights, "He did tell me that he had brought it in and that at that point he didn't want to talk to me anymore." RP 142-43.

Following the conclusion of the prosecutor's rebuttal argument, the Court addressed the prosecutor in front of the jury and addressed the jury directly. The court referred to the two exhibits admitted as the alleged heroin as "drugs," "actual drugs," "contraband," and "harmful substances." RP 224-25. The court stated, "Counsel, we have drugs here and typically they don't go back in the jury room with the jurors and that's somewhat why we have pictures here." RP 224. "There is a photograph, but typically the evidence that's in the bags, the actual drugs, normally don't go back." RP 225. The court continued on, "we do not [let] contraband back to the jury room . . . Obviously, that type of thing . . . could be harmful substances and such in those bags and things and that's why they don't just go back [into the jury room]." RP 225.

A jury convicted Mr. Zahn of the sole count of possession of a controlled substance. CP 21.

E. ARGUMENTS WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals found no violation of the right to counsel despite the trial court forcing Mr. Zahn to proceed pro se in the absence of an unequivocal request to do so and failing to conduct a contemporaneous inquiry into whether Mr. Zahn knowingly, intelligently, and voluntarily waived his right to counsel at the time he first proceeded pro se.

The Court of Appeals erroneously concluded the trial court acted properly when it foisted self-representation upon Mr. Zahn after a single comment of frustration at his first court appearance, finding the comment to be an unequivocal request to proceed pro se. In so finding, the Court failed to apply factors this Court has outlined in *State v. Curry* and other cases. 191 Wn.2d 475, 423 P.3d 179 (2018).

In addition, the Court erred in finding the waiver of counsel was knowing, intelligent, and voluntary where, at the time the trial court relieved counsel and declared Mr. Zahn was proceeding pro se, the court failed to engage in a colloquy. In fact, the court did not question Mr. Zahn until two court appearances later, during which time Mr. Zahn had been representing himself for two weeks. The Court of Appeals' opinion finding this belated inquiry was sufficient to establish a knowing, intelligent, and voluntary waiver conflicts with the spirit of many right to counsel cases, with the constitutional mandate, and with public interest. This Court should accept review pursuant to RAP 13.4(b) (1)-(4).

a. Courts may not permit individuals to relinquish their constitutional rights to counsel without an unequivocal request from the defendant and a knowing and voluntary waiver.

Individuals charged with crimes have a constitutional right to the assistance of counsel. Const. art. I, §§ 3, 22; U.S. Const. amends. VI, XIV. Because of the importance of this constitutional right, courts "must indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel." *Curry*, 191 Wn.2d at 487 (internal citations omitted); *Faretta v. California*, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Courts must engage in a multi-step determination before permitting a defendant to proceed pro se. "First, the court must determine whether the request for self-representation is timely and unequivocal" by analyzing "(1) Was a request made? If so (2) was that request unequivocal?" *Curry*, 191 Wn.2d at 486-87. "Second, if the request is timely and unequivocal, the court must then determine whether the request is also voluntary, knowing, and intelligent." *Id.* at 486. Only where courts determine both that a defendant made an unequivocal request and that the defendant is knowingly and voluntarily waiving his right to counsel does the strong presumption against the waiver of the right to counsel dissolve and may a court permit a defendant to proceed pro se.

b. Mr. Zahn made no unequivocal request to proceed pro se, and the Court of Appeals ignored the factors in *Curry* in concluding that he did.

In the absence of a clear and unequivocal request to proceed pro se, the court may not permit it. *Curry*, 191 Wn.2d at 486-87. The principle that a defendant must request to proceed pro se is evidenced by the rule that a court need not advise defendants of their right to proceed pro se; rather, defendants must affirmatively make a request. *See State v. Fritz*, 21 Wn. App. 354, 359, 585 P.2d 173 (1978).

Here, Mr. Zahn made a single passing comment expressing frustration during his very first court appearance: "I just don't feel that I can fully trust um my attorney and um I would like to represent myself in this matter." RP 6. Mr. Zahn's request was as much one expressing dissatisfaction with his attorney as it was a request to proceed pro se. *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 690 (1995) (where it was clear defendant's statements were only "an expression of frustration by [the defendant] with the delay in going to trial," comment was not an unequivocal assertion of right to self-representation); *State v. Woods*, 143 Wn.2d 561, 587, 23 P.3d 1046 (2001) (finding statement that defendant will "be prepared to proceed with—with this matter here without counsel come [the next court date]" to be expression of frustration and displeasure

with trial delay, not unequivocal request to proceed pro se). Mr. Zahn's comment was not an unequivocal request to proceed pro se.

The Court of Appeals' opinion finding this single comment at the very first court appearance to be an unequivocal request to waive counsel fails to apply this Court's analysis in *Curry*. In evaluating a suspected request for self-representation, courts must consider "how the request was made," "the language used in the actual request," and "the context surrounding the request." *Curry*, 191 Wn.2d at 488. A court may not rely merely on the words spoken but "must view the record as a whole, keeping in mind the presumption against the effective waiver of right to counsel." *In re Detention of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999).

Here, unlike in *Curry*, then-existing defense counsel failed to file a written motion outlining the legal standards and relevant facts that permitted the defendant to proceed pro se, the court held no formal hearing on the issue, entered no written findings or conclusions, the court failed to fully inquire into Mr. Zahn's motivation, education, and whether the decision was his alone, and the court failed to appoint standby counsel. *See Curry*, 191 Wn.2d at 491-92.

The Court of Appeals opinion fails to apply the factors identified by this Court in *Curry* and conflicts with the presumption against the

waiver of the right to counsel. This Court should grant review under RAP 13.4(b) (1) and (3).

c. The trial court did not engage in a timely colloquy with Mr. Zahn.

Even if this had been an unequivocal request to proceed pro se, the court violated Mr. Zahn's right to counsel by failing to make a *contemporaneous* inquiry into whether Mr. Zahn was knowingly, intelligently, and voluntarily waiving his right to counsel. Words reflecting a desire to proceed pro se are not enough. In addition to an unequivocal request, *before* permitting a defendant to proceed pro se, the court must determine the defendant understands the request and that, by the nature of the request, he is knowingly, intelligently, and voluntarily waiving his right to counsel.

Although "[t]here is no formula" for determining whether a defendant's waiver is a knowing and voluntary waiver of counsel, courts have identified certain issues that, at a minimum, courts must discuss with defendants or of which the record must show the defendant was aware. *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). At minimum courts have held the colloquy or evidence should be sufficient to ascertain that the individual understands "the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense." *State v. DeWeese*, 117

Wn.2d 369, 378, 816 P.2d 1 (1991). This ensures a defendant "was fully apprised of [relevant] factors and other risks associated with self-representation that would indicate that he made his decision with his 'eyes open.'" *Silva*, 108 Wn. App. at 540 (holding even particularly skillful defendant lacked relevant knowledge to make knowing and voluntary waiver) (quoting *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)).

This inquiry must occur *at the time* the defendant is permitted to proceed pro se. *See Silva*, 108 Wn. App. at 540 (discussing factors and risks of self-representation of which defendant must be aware at the time he decides to waive counsel); *United State v. Erskine*, 355 F.3d 1161, 1169 (9th Cir. 2004) (discussing "temporal focus" on "what the defendant understood *at the particular stage of the proceeding at which he purportedly waived his right to counsel*.") (emphasis in original). Here, the colloquy did not occur until Mr. Zahn had already been appearing pro se for two court appearances and over two weeks. That is contrary to established case law and fails to protect the constitutional rights at stake.

The Court of Appeals found Mr. Zahn knowingly, intelligently, and voluntarily waived his right to counsel even though the trial court failed to engage in the colloquy at the time the court declared he was proceeding pro se. The court's later colloquy, two weeks and two court

appearances later, cannot establish that Mr. Zahn knowingly, intelligently, and voluntarily waived his right to counsel at the time the court found he made an unequivocal request. Because the court failed to conduct an adequate colloquy into Mr. Zahn's waiver *at the time he began proceeding pro se*, the Court of Appeals decision affirming the conviction is erroneous and conflicts with the constitutional right to counsel.

This Court should grant review pursuant to RAP 13.4(b) (1)-(4).

2. The Court of Appeals misapplied the proper legal standard in concluding the jury instructions cured any prejudice from the court's multiple unconstitutional comments on the evidence.

The Court of Appeals recognized the trial court improperly commented on the evidence when it made multiple comments to and in the presence of the jury that the evidence was "drugs," "actual drugs," "contraband," and "harmful substances." Opinion at 14. In addition, the Court acknowledged the trial court's multiple comments "had the likely effect of suggesting to the jury that they need not consider whether the State proved Zahn possessed heroin because the trial court clearly believed the exhibits were drugs." Opinion at 14. Nonetheless, the Court found the multiple improper comments harmless.

Courts must presume prejudice from judicial comments on the evidence. *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1968).

The Court of Appeals erroneously concluded Mr. Zahn was not prejudiced by the improper comments because the evidence against Mr. Zahn was strong and the standard instruction informed the jury to disregard any comments on the evidence the judge may have made. In finding the error harmless, the Court relied on the fact that pro se Mr. Zahn's defense was "limited and largely ineffective." Opinion at 14. But Mr. Zahn did challenge the identity of the controlled substance. *See, e.g.,* RP 151 (cross examining Sergeant Arnold on the fact he is not a drug recognition expert), 158-60 (voir dire of Dr. Stenzel on chain of custody, testing procedures), 171 (cross examining Dr. Stenzel on whether he personally tested substances). And the failure to introduce affirmative evidence disputing the identity of the controlled substance is not dispositive. *See State v. Jackman*, 156 Wn.2d 736, 743-45, 132 P.3d 136 (2007) (finding State failed to rebut presumption of prejudice even where victim's age was not in dispute and where defense did not challenge this element).

In addition, the Court's reliance on the jury instructions to cure these improper comments is misplaced. Opinion at 14. The court instructed the jury *before* the court's improper comments. *See* RP 123-24 (instructions on judicial comments), 224-25 (court's unconstitutional comments to jury). And the court gives such an instruction in every criminal case. Clearly, the giving of the instruction cannot be enough to

ensure jurors are not affected by comments or a comment on the evidence would never be reversible error.

In addition, the timing of the court's comments – occurring immediately before the jury began deliberations – increased its prejudicial effect. Here, it cannot be said "it affirmatively appears that the jury could not have been influenced by the comments of the trial judge." *State v. Bogner*, 62 Wn.2d 247, 256, 382 P.2d 254 (1963). This Court should grant review because the Court of Appeals misapplied the appropriate legal standard in focusing solely on the evidence against Mr. Zahn and the court's instruction to the jury that it should disregard any comments it made.

3. The Court of Appeals misapplied the proper legal standard in holding the State's comments violated Mr. Zahn's right to remain silent but failed to prejudice Mr. Zahn because of the significant evidence of guilt.

The State impermissibly commented on Mr. Zahn's right to silence in both the prosecutor's opening statement and in questioning a witness. First, the prosecutor stated, "The defendant declined to say really anything further about the event," in response to police questioning after his arrest. RP 127. Second, Sergeant Arnold testified that after he read Mr. Zahn his *Miranda* warnings, "at that point he didn't want to talk to me anymore." RP 143. The Court of Appeals properly found both comments constituted

direct comments on Mr. Zahn's constitutional right to remain silent. Opinion at 10-12. The Court also recognized the State "infus[ed] improper evidence" into its case by the improper comments. Opinion at 12. However, the Court erred in finding these "impermissible direct comments on Zahn's right to silence" were harmless beyond a reasonable doubt. Opinion at 12.

In analyzing constitutional error, the United States Supreme Court has held that such error requires reversal unless the court is "able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). This requires courts to reverse unless they may determine "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder v. United States*, 527 U.S. 1, 15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (quoting *Chapman*, 386 U.S. at 24). Even cases with seemingly overwhelming evidence of guilt require reversal under this understanding.

For example, in *State v. Monday*, the Court reversed the defendant's convictions due to prosecutorial misconduct even where a surveillance video clearly displayed the defendant shooting the victim multiple times and the defendant confessed. 171 Wn.2d 667, 669-70, 680 n.4, 257 P.3d 551 (2011). Despite the significant evidence of guilt, the

court could not determine that the prosecutor's misconduct did not contribute to the verdict. *Id.* at 680-81. Therefore, the court reversed.

Here, the Court relied on the largely undisputed evidence and "impregnable case" to find the unconstitutional evidence harmless. Opinion at 12. But the proper test is not to consider whether the evidence supports the verdict but whether it can be determined that the misconduct did not contribute to the verdict. This Court should grant review because the Court misapplied the constitutional harmless error test.

F. CONCLUSION

This Court should grant review pursuant to RAP 13.4(b).

DATED this 17th day of September, 2019.

Respectfully submitted,

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APPENDIX 1

July 9, 2019, unpublished opinion

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

STATE OF WASHINGTON, Respondent, v. BLAKE ANDREW ZAHN, Appellant.	)))))))))	No. 35805-4-III UNPUBLISHED OPINION

LAWRENCE-BERREY, C.J. — Blake Zahn appeals after his conviction for possession of a controlled substance, heroin. We affirm his conviction, but reverse the imposition of his legal financial obligations (LFOs) and remand so the trial court can make appropriate inquiries into Zahn's financial circumstances.

FACTS

On September 25, 2017, Blake Zahn was arrested and booked into the Okanogan County jail. After Zahn was placed into the jail, corrections officers found what they suspected was heroin on him. Zahn received proper *Miranda*[1] warnings and admitted that

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

he brought the item into the jail. The State charged Zahn with possession of a controlled substance other than marijuana.

Pretrial

At the scheduled arraignment, defense counsel thought there was a settlement agreement, but Zahn told his counsel that he wished to represent himself. The court questioned Zahn, who said, "I just don't feel that I can fully trust um my attorney and um I would like to represent myself in this matter." Report of Proceedings (RP) (Oct. 9, 2017) at 6. The arraignment was continued one week to consider a settlement offer from the State.

The next week, Zahn told the court that he was saving money to hire an attorney. Because Zahn had not hired an attorney yet, the court granted another one-week continuance.

The following week, Zahn told the court he appointed a "special master" to his case. RP (Oct. 23, 2017) at 16. The court questioned the qualifications of the "special master" because the court had not received a notice of appearance. The court obtained credible information that the purported attorney was not an attorney, and the court advised Zahn that his "special master" could not represent him. Zahn then said, "We can proceed, Your Honor." RP (Oct. 23, 2017) at 20.

The court informed Zahn of the charge against him, the elements of that charge, and the maximum penalties it carried. Zahn answered that he understood. The court told Zahn he had the right to be represented by a lawyer and, if he could not afford one, a lawyer could be appointed at public expense, and informed him of his other constitutional rights. The court then engaged in the following colloquy:

> THE COURT: Mr. Zahn, one of the purposes today here is to make sure that you have adequate representation. You have the right to represent yourself, as well as you have the right to have the Court appoint an attorney for you. My question today is the fact as to whether you're going to represent yourself. The individual you have proposed is not authorized to practice law in this Court and in the State of Washington. . . .
>
> So, I need to be clear here today. Is it your intent to go forward and represent yourself or are you asking the Court to appoint an attorney that's authorized to practice in the State of Washington.
>
> MR. ZAHN: It's my intent—
>
> THE COURT: To represent you?
>
> MR. ZAHN: To go forward and represent myself, Your Honor.

RP (Oct. 23, 2017) at 23-24.

Zahn assured the court he had represented himself before, he was familiar with the Rules of Evidence and the Rules of Criminal Procedure, and he had utilized those in prior proceedings. Zahn reiterated that he was the only person he trusted.

The trial court advised Zahn against his choice:

> [You would be] better off being defended or represented by a trained lawyer rather than by yourself. I think generally those that represent themselves make an unwise decision. . . . I would strongly urge you to not represent yourself, to have counsel assist you and represent you. There's a lot of dangers and disadvantages in self-representation, but if you still desire to represent yourself and to give up that right to be represented by a lawyer, I need to know, are you doing that freely and voluntarily?

RP (Oct. 23, 2017) at 25-26. Zahn answered that he was. The trial court found that Zahn had knowingly, voluntarily, and intelligently waived his right to an attorney.

At the first omnibus hearing, Zahn failed to file his omnibus application. The trial court offered to appoint stand-by counsel. Zahn denied the offer. Zahn later was arrested on a bench warrant for failure to appear in court. Zahn still had not filed an omnibus application. The court stressed to Zahn its concern about him representing himself. Zahn reaffirmed his decision to represent himself and refused the court's offer to appoint counsel.

Trial

In its opening argument to the jury, the State outlined the testimony of its five witnesses. This included a summary of Sergeant Kevin Arnold's testimony:

> He asked the defendant, well, basically did you . . . bring [the substance] into the jail or did you get it from somebody else in the jail and the defendant answered that he brought it into the jail.

> The defendant declined to say really anything further about the event. Sergeant Arnold took the suspected drugs and these were packaged up and they were sent to the crime laboratory . . . .

RP (Jan. 3, 2018) at 126-27.

The State's witnesses presented overwhelming evidence of Zahn's guilt. Deputy Gordon Mitchell testified he arrested Zahn, drove him to the jail, and later reviewed his patrol video that showed Zahn may have hidden something on his person. Deputy Mitchell reported this to the jail.

Corrections officers testified they took Zahn to the medical room for a strip search. Before the strip search, Zahn handed over a pair of folded socks from his pants. A corrections officer felt an object inside the socks. The other officer unrolled the socks and saw a package that appeared to contain drugs. The officers notified dispatch.

Dispatch contacted Sergeant Arnold. Sergeant Arnold testified he went to the jail and learned that corrections staff had found possible narcotics on Zahn. He examined what the corrections officers had found—a black, tar-like substance that was wrapped in a sock. Sergeant Arnold then questioned Zahn and asked whether he had brought the substance into the jail or whether he had obtained it from someone else inside the jail. He testified that Zahn admitted he brought the substance into the jail. Sergeant Arnold added, "[A]nd that at that point he didn't want to talk to me anymore." RP (Jan. 3, 2018)

at 143. Sergeant Arnold photographed and weighed the substance and sent it to the crime laboratory.

Dr. Jason Stenzel, a forensic technician, testified that he performed two tests using verified scientific methods on the substance. Both tests concluded that the substance contained heroin.

The State rested. Zahn did not present any evidence. Both parties gave the jury their closing arguments.

Before excusing the jury to begin deliberations, the court addressed the parties:

> Counsel, we have drugs here and typically they don't go back in the jury room with the jurors . . . .
>
> . . . .
>
> THE COURT: There is a photograph, but typically the evidence that's in the bags, the actual drugs, normally don't go back.
>
> . . . .
>
> THE COURT: . . . I just want to make you aware, we do not [sic] contraband back to the jury room . . . . Obviously, that type of thing, which is not—could be harmful substances and such in those bags and things and that's why they just don't go back.

RP (Jan. 3, 2018) at 224-25.

The jury returned a guilty verdict. The following day, the court sentenced Zahn to 3 months' imprisonment, 12 months' community custody, and imposed mandatory LFOs totaling $2,210.50.

Before imposing those obligations, the court inquired about Zahn's employment over the past three years. Zahn said he was currently working and expected to be working after he was released from jail. The court found that Zahn had the ability to pay.

Zahn timely appealed to this court.

ANALYSIS

Zahn assigns four errors: (1) the trial court unconstitutionally forced him to proceed pro se, (2) the State, twice, impermissibly commented on his constitutional right to remain silent, (3) the trial court commented on the evidence that relieved the State of its burden to prove all of the elements beyond a reasonable doubt, and (4) the trial court engaged in an inadequate inquiry and all LFOs should be struck.

ZAHN'S PRO SE REPRESENTATION

Zahn contends the trial court erred by forcing him to proceed pro se and by conducting an inadequate inquiry. We disagree.

A trial court's decision on a defendant's request to proceed pro se is reviewed for an abuse of discretion. *State v. Curry*, 191 Wn.2d 475, 483, 423 P.3d 179 (2018). "An abuse of discretion occurs only when the decision of the court is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v.*

McCormick, 166 Wn.2d 689, 706, 213 P.3d 32 (2009) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

Criminal defendants have a constitutional right to self-representation. WASH. CONST. art. I, § 22; *Curry*, 191 Wn.2d at 482. This right is in tension with a criminal defendant's right to the assistance of counsel. *Curry*, 191 Wn.2d at 482; *State v. DeWeese*, 117 Wn.2d 369, 376, 816 P.2d 1 (1991). To harmonize this tension, a defendant must unequivocally request to proceed pro se and the "'trial court must establish that a defendant, in choosing to proceed pro se, makes a knowing and intelligent waiver of the right to counsel.'" *Curry*, 191 Wn.2d at 483 (quoting *DeWeese*, 117 Wn.2d at 377).

If the request is untimely or equivocal, the court must deny the request. *Id.* "The threshold issues of timeliness and equivocality focus on the nature of the request itself—if, when, and how the defendant made a request for self-representation—not on the motivation or purpose behind the request." *Id.* at 486-87. The court should examine the facts and circumstances of the case and the request, including how the request was made, the language used in the request, and the context surrounding the request. *Id.* at 488.

Here, Zahn's request was timely and unequivocal. At his first scheduled arraignment, Zahn told his counsel he wished to represent himself. The arraignment was

continued twice, after which time the court advised Zahn of his constitutional rights, including his right to appointed counsel and to represent himself. After being so advised, Zahn made a clear and unequivocal choice to represent himself. After further questioning from the trial court, Zahn responded that he was making his choice freely and voluntarily. Still later in the process, after the trial court offered to appoint counsel for Zahn, Zahn reiterated his desire to represent himself.

We conclude that the trial court did not abuse its discretion by allowing Zahn to proceed pro se. Zahn's request was timely, unequivocal, he later re-asserted it, and the trial court ensured that Zahn's waiver was knowing, intelligent, and voluntary.

STATE'S COMMENTS ON ZAHN'S RIGHT TO SILENCE

Zahn contends the State unconstitutionally commented on his right to remain silent. We conclude that the comment, which occurred after Zahn handed over the drugs and admitted he brought them into jail, was harmless beyond a reasonable doubt.

The Fifth Amendment to the United States Constitution guarantees that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." Otherwise known as the right to silence, this right has been made applicable to Washington through the Fourteenth Amendment. *State v. Easter*, 130 Wn.2d 228, 235, 922 P.2d 1285 (1996); *see also* WASH. CONST. art. I, § 9. Specifically, in the postarrest

context, the State cannot comment on a defendant's right to remain silent. *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002); *see also Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). "Warnings under *Miranda* given upon arrest 'constitute an "implicit assurance" to the defendant that silence in the face of the State's accusations carries no penalty,' making it fundamentally unfair to then penalize the defendant by offering his silence as evidence of guilt." *State v. Terry*, 181 Wn. App. 880, 889, 328 P.3d 932 (2014) (quoting *Easter*, 130 Wn.2d at 236).

Because both statements by the State were unobjected to by Zahn, we must first determine whether the statements were "comments" or "references" relating to Zahn's silence. *Id*. at 890. "[B]oth are improper, but only the former rise[s] to the level of constitutional error, and that what are merely improper references are not reviewable for the first time on appeal." *Id.* (internal quotation marks omitted). The focus is to examine the purpose of the remarks. *Id.* at 891.

Beginning with "comments," a further inquiry is necessary: as established in *Romero*, courts should use a two-part analytical test to determine whether the comments were direct or indirect. *Romero*, 113 Wn. App. at 790-91. This framework is still used by the courts. *See State v. Whitaker*, 6 Wn. App. 2d 1, 429 P.3d 512 (2018); *Terry*, 181 Wn. App. 880. If the comment was direct, constitutional error exists and the court must

apply a constitutional harmless error beyond a reasonable doubt analysis. *Romero*, 113 Wn. App. at 790. "A direct comment occurs when a witness or state agent makes reference to the defendant's invocation of his or her right to remain silent." *State v. Pottorff*, 138 Wn. App. 343, 346, 156 P.3d 955 (2007) (finding officer's testimony, "'He said at that time he wanted to invoke his right to remain silent'" constituted a direct comment); *see also Whitaker*, 6 Wn. App. 2d at 39-40 (finding officer's testimony that he read the defendant his *Miranda* rights, but the defendant did not speak with him, constituted a direct comment); *Romero*, 113 Wn. App. at 793 (finding officer's testimony, "'I read him his *Miranda* warnings, which he chose not to waive, would not talk to me'" constituted a direct comment); *State v. Curtis*, 110 Wn. App. 6, 9, 13, 37 P.3d 1274 (2002) (finding officer's testimony, "'I read him his *Miranda*, his constitutional rights. . . . He refused to speak with me at the time, and wanted an attorney present'" constituted a direct comment).

Here, the State's opening comment and a portion of Sergeant Arnold's testimony amounted to a direct comment on Zahn's constitutional right to silence similar to *Pottorff*, *Romero*, and *Curtis*. During the State's opening and in the sergeant's testimony, the jury learned that Zahn admitted he brought the drugs into the jail, but chose not to say

anything further. Although these are impermissible direct comments on Zahn's right to silence, we are convinced they were harmless beyond a reasonable doubt.

Before exercising his right to silence, Zahn handed over the suspected drugs and admitted he had brought them into the jail. The evidence was undisputed that the suspected drugs tested positive as heroin. With such an impregnable case and facing an unrepresented defendant, one wonders why the State sought to jeopardize its case by infusing improper evidence into it. But our role is not to question the State's choices, but to determine whether the improper evidence was harmless beyond a reasonable doubt. Here, the evidence of guilt was overwhelming and undisputable.

JUDICIAL COMMENTS ON THE EVIDENCE

Zahn contends the trial court made an improper comment on the evidence when it advised the parties, in the jury's presence, that the substances in question were actually drugs. Zahn argues that this improper comment relieved the State of its burden to prove this element. We accept the State's concession that the court's comment was improper. But we determine that Zahn was not prejudiced by it.

Zahn did not object to the court's statements; however, a judicial comment on the evidence is an error of constitutional magnitude that can be raised for the first time on appeal. *State v. Sivins*, 138 Wn. App. 52, 59, 155 P.3d 982 (2007); RAP 2.5. Article IV,

section 16 of the Washington Constitution states that "[j]udges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." In other words, judges are prohibited from commenting on the evidence. WASH. CONST. art. IV, § 16; *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006). "[A]ny remark that has the potential effect of suggesting that the jury need not consider an element of an offense could qualify as judicial comment." *Levy*, 156 Wn.2d at 721. "It is sufficient if a judge's personal feelings about a case are merely implied." *Sivins*, 138 Wn. App. at 58. This important constitutional provision serves to protect the jury from being unduly influenced by the court's opinion on the evidence. *Id.*

Washington courts use a two-step analysis to determine whether reversal is required due to a judicial comment on the evidence. *Levy*, 156 Wn.2d at 723. First, to determine whether a court's conduct or remarks rise to a comment on the evidence, courts examine the facts and circumstances of the case. *Sivins*, 138 Wn. App. at 58. If there was a judicial comment, it is "presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *Levy*, 156 Wn.2d at 723.

Here, the court's remarks did amount to a comment on the evidence. In front of the jury, the court had a discussion with the parties about not sending the exhibits back with the jury because they were "drugs," "actual drugs," "contraband," and "harmful substances." These remarks had the likely effect of suggesting to the jury that they need not consider whether the State proved Zahn possessed heroin because the trial court clearly believed the exhibits were drugs. Nonetheless, "there is 'overwhelming untainted evidence' to support the conviction." *Sivins*, 138 Wn. App. at 61.

The record overwhelmingly establishes Zahn's guilt. Zahn voluntarily handed over suspected drugs to the corrections officers and then admitted to Sergeant Arnold that he had brought them into the jail. Dr. Stenzel testified that he tested the substance using two different verified scientific methods and both methods returned that the substance contained heroin. Compared with this strong evidence, Zahn's cross-examination was limited and largely ineffective, he called no witnesses, and his closing argument was for jury nullification.

Furthermore, any potential error was cured by the jury instructions. *State v. Eisner*, 95 Wn.2d 458, 463, 626 P.2d 10 (1981). The court instructed the jury to disregard any judicial comments on the evidence. Jurors are presumed to follow the instructions of the court. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

Although the trial court's comments were improper, we find that they were harmless beyond a reasonable doubt. *State v. Lane*, 125 Wn.2d 825, 840, 889 P.2d 929 (1995); *Sivins*, 138 Wn. App. at 61.

LFOs

Zahn contends all discretionary LFOs should be struck because he was indigent at the time of sentencing. Alternatively, he contends the trial court conducted an inadequate inquiry into his present and future ability to pay, and that remand is necessary to determine whether discretionary LFOs should be imposed. He further contends that the criminal filing fee and the DNA collection fee must be struck.

Zahn's arguments are based on recent statutory changes, applicable to cases pending direct review on or after the effective date of the legislation, June 7, 2018. *See State v. Ramirez*, 191 Wn.2d 732, 738, 747, 426 P.3d 714 (2018).

Recently amended RCW 10.01.160(3) prohibits trial courts from imposing discretionary LFOs on defendants who, at the time of sentencing, are indigent as defined

in RCW 10.101.010(3)(a) through (c).[2] In addition, for defendants who are *not* indigent at the time of sentencing, the court "shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose." RCW 10.01.160(3).

Additional recent amendments include RCW 36.18.020(2)(h) and RCW 43.43.754. The former prohibits imposition of the criminal filing fee on indigent defendants. The latter prohibits imposition of the DNA collection fee when the State has previously collected the offender's DNA as a result of a prior conviction.

The record does not permit us to determine whether Zahn, at the time of sentencing, was or was not indigent within the definition of RCW 10.101.010(3). Even assuming Zahn was *not* indigent at that time, there was no inquiry into Zahn's financial resources and the nature of the burden that payment of LFOs would impose. The record

[2] (3) "Indigent" means a person who, at any stage of a court proceeding, is:

(a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or

(b) Involuntarily committed to a public mental health facility; or

(c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level . . . .

also is insufficient for us to determine whether Zahn had his DNA previously collected as a result of a prior conviction.

We reverse the imposition of LFOs and remand this matter so the trial court can make the following determinations with respect to LFOs: First, the trial court must determine if Zahn was "indigent," as defined by RCW 10.101.010(3) at the time of his original sentencing. If he was, we direct the trial court to strike all discretionary LFOs in accordance with RCW 10.01.160(3) and the criminal filing fee in accordance with RCW 36.18.020(2)(h).

Second, if the trial court determines that Zahn was *not* indigent, the trial court must conduct an adequate *Blazina*[3] inquiry to determine to what extent imposition of discretionary LFOs are appropriate. At a minimum, the court must consider the length of Zahn's incarceration, his other debts, including restitution, his employment history, his financial situation, and his ability to pay. *Blazina*, 182 Wn.2d at 838-39; *State v. Glover*, 4 Wn. App. 2d 690, 695-96, 423 P.3d 290 (2018).

Third, the trial court must consider whether to impose the $100 DNA collection fee. If the State believes that Zahn has not had his DNA collected—despite his multiple

[3] *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

prior felony convictions—it must present evidence at resentencing to substantiate its belief.

Affirmed, but reverse LFOs and remand to ensure only proper LFOs are imposed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Lawrence-Berrey, C.J.

WE CONCUR:

Siddoway, J.

Fearing, J.

APPENDIX 2

August 20, 2019, order denying motion for reconsideration

FILED
AUGUST 20, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 35805-4-III**
	)	
Respondent,	)	
	)	
v.	)	**ORDER DENYING**
	)	**MOTION FOR**
BLAKE ANDREW ZAHN,	)	**RECONSIDERATION**
	)	
Appellant.	)	

The court has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED the motion for reconsideration of this court's decision of July 9, 2019, is denied.

PANEL: Judges Lawrence-Berrey, Siddoway and Fearing

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
CHIEF JUDGE

IN THE SUPREME COURT OF STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	COA NO. 35805-4-III
	)	
BLAKE ZAHN,	)	
	)	
PETITIONER.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF SEPTEMBER, 2019, I CAUSED THE ORIGINAL **PETITION FOR REVIEW TO THE SUPREME COURT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] ARIAN NOMA	( )	U.S. MAIL
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OKANOGAN COUNTY PROSECUTOR'S OFFICE	(X)	E-SERVICE VIA PORTAL
PO BOX 1130		
OKANOGAN, WA 98840-1130		
[X] BLAKE ZAHN	(X)	U.S. MAIL
PO BOX 778	( )	HAND DELIVERY
METHOW, WA 98834	( )	_____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF SEPTEMBER, 2019.

X_____

Washington Appellate Project
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