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Division II
State of Washington
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NO. 49560-1-II

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

STATE OF WASHINGTON,
Respondent,

v.

ZAKARY T. BAILEY,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE F. MARK MCCAULEY, JUDGE

BRIEF OF RESPONDENT

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I. COUNTER STATEMENT OF THE CASE

a) Procedural History

The Appellant was charged by Information on July 5, 2016, with a Violation of the Uniform Controlled Substances Act for Possession of Heroin with Intent to Deliver. The Information also alleged a school zone enhancement pursuant to RCW 69.50.435(1)(c) and RCW 9.94A.533(6). CP 1. On September 7, 2016, defense filed a motion to dismiss based on law enforcement's destruction of syringes and a bottle pipe that were seized from the Appellant. CP 35-45. The court denied the Appellant's motion to dismiss but limited the State's direct examination of Deputy Steiner, cross examination of The Appellant, and opening, closing, and rebuttal statements by prohibiting questions or arguments on the topic of whether markings existed on the items. CP 70; CP 101; 09/08/16 RP at 233. The case proceeded to jury trial on September 7, 2016 and the Appellant was convicted as charged. CP 80-81.

The Appellant renewed his motion to dismiss on September 19, 2016. CP 86-92. The State filed a response on October 13, 2016. CP 100-109. The court heard the motion on October 17, 2016 when it was again denied. CP 110. The court then proceeded to impose a standard range sentence. CP 114-124. The Appellant timely appealed.

b) Factual Summary

On July 1, 2016, Deputy Carson Steiner observed The Appellant walking out of a residence carrying a backpack with a large padlock and arrested him on an outstanding warrant. 09/07/16 RP 94-99, 101. The Appellant admitted to having a loaded syringe in his pocket, which the deputy then located and secured. 09/07/16 RP 100. Deputy Steiner observed a brown liquid in the syringe and field tested it at the scene. 09/07/16 RP 100.

After being advised of his *Miranda* warnings he was transported to the jail, where Deputy Steiner obtained permission from the Appellant to search the backpack. 09/07/16 RP 101. The Appellant opened the padlock on the backpack using his keys and smiled as he advised the deputy that he would find a large amount of paraphernalia, but nothing else. 09/07/16 RP 102; 116. Inside the backpack, Deputy Steiner located drug paraphernalia including: a digital scale with white residue on it, rubber gloves, strips of tinfoil of a type commonly used to smoke drugs, a Coke bottle that had been fashioned into a smoking device, cotton, spoons, baggies, two empty syringes and another loaded syringe filled with brown liquid. 09/07/16 RP 102-103; 110; 115; 139. These items were photographed. 09/07/16 RP 103.

Prior to the case being opened, the Appellant stated, "Open it. You're going to be surprised how I treat my clients." 09/07/16 RP 117. As Steiner looked through the case, the Appellant also exclaimed, "I am a business man and I conduct business right!" and smiled and stated, "I told you, I have to take GOOD care of my n***as." 09/07/16 RP 117-118. When the deputy also located a second loaded syringe inside the box, the tone of the contact changed and the Appellant became quiet. The Deputy informed The Appellant that he knew what was in the syringes, to which The Appellant replied, "I know." 09/07/16 RP 118.

After completing the booking process, the deputy took the items seized from The Appellant and processed them. The brown liquid in the syringes was put into a glass vial in order for them to be sent to the crime lab for testing. 09/07/16 RP 119. These substances tested positive for 09/07/16 RP at 203-204.

Per standard policy, all syringes were immediately destroyed for safety reasons. 09/07/16 RP 119-120. The remaining items were kept in the box and logged as evidence, save for the bottle that had been fashioned into a pipe. Since the deputy did not cite nor refer the Appellant for a charge of drug paraphernalia as the Appellant was already being referred for a more serious felony drug charge, and since the illegal pipe could not

be returned to The Appellant, it too was immediately destroyed. RP 130-131.

Deputy Steiner also testified that he made measurements from where he arrested the Appellant to two nearby school bus stops. RP 124. The first bus stop, in the 1100 block of Wakefield, was measured with a roller wheel at a distance of 572 feet. RP 125. Deputy Steiner also "paced" the distance using the estimate that one stride is approximately 3 feet. This yielded a distance of 585 feet. RP 125. The second stop, at West Martin, was measured in the same way. RP 127. This yielded a roller wheel distance of 878 feet and a "paced" distance of 890 feet. RP 127. The location of the bus stops was verified by Tom Boling, the director of transportation for the Elma School District. 09/07/16 RP at 213-217.

Deputy Steiner was questioned as follows about the accuracy of the roller wheel:

> Q. Okay. And you have not yourself checked for the accuracy of this clicker?
>
> A. No.
>
> Q. Okay. So it could say that you walked 15 feet and it could be off?

A. Well, I mean my pacing method versus the clicker is relatively close. They were within a few feet of each other after 500 feet. So I would say it's pretty accurate, but. . .

Q. But you have not actually checked it –

A. No. I have not tested it, no.

09/07/16 RP at 144.

Detective Schrader testified as to his education, experience, and training related to drug culture, specifically with regard to users and various levels of dealers. 09/07/16 RP at 155-162. The detective testified that generally drug dealers were also drug users. 09/07/16 RP at 163. He reported that some dealers only made enough money to support their own habits and may not carry large amounts of cash while others might sell pounds and make tens of thousands of dollars. 09/07/16 RP at 162-163.

He testified as to the various methods by which drug dealers package their product for sale, including selling pre-loaded syringes. 09/07/16 RP at 163-165. With regard to selling pre-loaded syringes, the detective testified that this was often done as a method of drawing customers in with convenience. 09/07/16 RP at 164-165. He testified that in all of his years of training and experience, he had never heard of a "paraphernalia dealer" and also noted that there was a needle exchange in

the Harbor at which anyone could obtain clean needles. RP 171. The detective also reviewed and explained all of the items that he could identify in the kit recovered from the Appellant, which included several items that the detective was familiar with as being associated with selling controlled substances. 09/07/16 RP at 173-185.

During the defense case in chief, the Appellant stated that he sold paraphernalia, not drugs, and that he found needles on the ground which he later sold to others. 09/08/16 RP at 237-239. He asserted that his personal items were always marked with roman numerals, pointing out those numerals on the exterior of his kit. 09/08/16 RP at 239; 241. He reviewed the items in his kit, to include syringes and smoking devices, stating that the ones which were destroyed (but, apparently, no other items inside the kit) also had these markings. 09/08/16 RP at 241-247.

He did not explain during direct why he had two loaded syringes. He did state that the two empty syringes were "picked up next to the – the 11th street park." 09/08/16 RP at 238; 248. The Appellant also testified that his preferred method of ingesting heroin was to smoke it. 09/08/16 RP at 252. He also admitted that "...I don't like - I don't like needles. I'm afraid of them..." 09/08/16 RP at 240.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1) The trial court's denial of the Motions to Dismiss, under CrR 8(b) was not error.

The Appellant alleges that the trial court erred when it denied his motions to dismiss based on the routine destruction of four syringes (2 empty, 2 loaded) seized from his person. The materiality alleged in the trial court is that the two loaded syringes had the Appellant's personal "XIV" mark while the two empty ones did not. CP 87.

After considering the destruction of the syringes, the trial court found dismissal to be an improper remedy. Instead, the court precluded the State from putting "...on evidence that, oh, no, there were no markings on the syringes." 09/08/16 RP at 233.

The Fourteenth Amendment and the Washington Constitution both require "that criminal prosecutions conform with prevailing notions of fundamental fairness and that criminal defendants be given a meaningful opportunity to present a complete defense." *State v. Wittenbarger,* 124 Wn.2d 467, 474-75, 880 P.2d 517 (1994). Due process requires that the prosecution disclose and preserve material, exculpatory evidence for use by the defendant. *Id.* Although there is a broad range of sanctions available to trial court confronted with destruction of evidence, dismissal is appropriate sanction only if a lesser remedy is ineffective to assure fair

trial. *State v. Boyd,* 29 Wn. App. 584, 629 P.2d 930, *review denied,* 96 Wn.2d 1012 (1981). Dismissal of charges is an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial. *State v. Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000).

Prior to the mid-1980s, the state of Washington, through Supreme Court decisions such as *Wright*, *Vaster*, and *Campbell*, applied a balancing test for cases in which evidence had been destroyed. *State v. Wright*, 87 Wn.2d 783, 792, 557 P.2d 1 (1976); *State v. Vaster*, 99 Wn.2d 44, 49, 659 P.2d 528 (1983); *State v. Campbell*, 103 Wn.2d 1, 18-19, 691 P.2d 929 (1984). These cases relied on the federal holding in *United States v. Bryant*, 439 F.2d 642, 644 (1971) for the creation of a balancing test in which a defendant's due process rights were deemed violated by the destruction of evidence if there was a "reasonable possibility" that the evidence would affect the defense. *State v. Ortiz*, 119 Wn.2d 294, 303-04, 831 P.2d 1060 (1992).

However, in 1984 and 1988, respectively, the United States Supreme Court issued its decisions in *Trombetta* and *Youngblood,* supplanting the principles in *Bryant*. *State v. Straka*, 116 Wn.2d 859, 883-84, 810 P.2d 888 (1991) (citing *California v. Trombetta,* 467 U.S. 479,

104 S.Ct. 2528 (1984) and *Arizona v. Youngblood,* 488 U.S. 51, 109 S.Ct. 333 (1988)).

In *Trombetta*, the U.S. Supreme Court determined that due process does not require agencies to preserve breath samples in order to introduce test results from them at trial, noting that the officers in the case acted "in good faith and in accord with their normal practice" when they destroyed the samples after testing. 467 U.S. at 488. The Court went on to say:

> "Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality…evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

Id. at 488-89.

Similarly, in *Youngblood*, a molestation, sexual assault, and kidnapping case where semen samples from the victim's body and clothing were destroyed, the Court held that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." 488 U.S. at 57. The *Youngblood* Court came to this conclusion based in part on

its "unwillingness to read the fundamental fairness requirement as 'imposing on the police an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.'" *Straka*, 116 Wn.2d at 884 (quoting *Youngblood*, 488 U.S. at 57).

Once the U.S. Supreme Court issued these opinions, the "reasonable possibility" standard put forth in *Wright*, *Vaster*, and *Campbell* was replaced by the criteria described above. *State v. Wittenbarger*, 124 Wn.2d 467, 479-81, 880 P.2d 517 (1994) (citing *Straka*, 116 Wn.2d 859 (1991) and *Ortiz*, 119 Wn.2d 294 (1992)). Time and again, our courts have applied the *Trombetta* and *Youngblood* standards in finding that evidence was only potentially exculpable and therefore the extraordinary remedy of dismissal was not appropriate. See *Straka*, 116 Wn.2d 859 (1991) (error messages from a BAC machine meant to inform the operator that the machine is unable to perform a reliable test were not material exculpatory evidence, the destruction of which warranted dismissal, because they did not confirm or deny accuracy of a test and thus are not directly related to guilt or innocence of a DUI defendant); *Ortiz*, 119 Wn.2d 294 (1992) (destruction of semen sample in aggravated first degree murder case did not warrant dismissal because, although the sample

had a 55 to 60 percent chance of exculpating the defendant based on his unique blood type, the evidence was only potentially exculpable); *Wittenbarger*, 124 Wn.2d 467 (1994) (consolidated DUI cases in which BAC machine maintenance and repair records were destroyed and defendants wished to attack the reliability of the machine, dismissal not warranted because the evidence was only tangentially related to whether the machine was functioning properly on any given day); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007) (destruction of a bag containing semen which the defendant argued was proof that he had been framed for rape did not warrant dismissal when it was only potentially exculpable); *State v. Groth*, 163 Wn. App. 548, 261 P.3d 183 (2011) (destruction of all physical evidence in a murder case did not warrant dismissal where evidence was only potentially useful or exculpable for the defendant).

If evidence is only potentially useful to a defendant, its destruction does not present a due process violation unless the defendant can prove that it was destroyed in bad faith. *Youngblood*, 488 U.S. at 57. The presence of absence of bad faith by the police for purposes of due process must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was destroyed. *Groth*, 163 Wn. App. at 558

(citing *Youngblood*, 488 U.S. at 56). As such, a defendant must show that the destruction was "improperly motivated." *Id.* (citing *Wittenbarger*, 124 Wn. 2d at 477-79). Furthermore, compliance with policy has routinely been cited as determinative of good faith. *Wittenbarger*, 124 Wn.2d at 477; *Ortiz*, 119 Wn.2d at 302; *Trombetta*, 467 U.S. at 488; *Groth*, 163 Wn. App at 559.

In the case at hand, the allegedly marked syringes and pipe did not have an exculpatory value that would have been apparent to the deputy before their destruction. The deputy would have had no reason to inspect the items for special markings and, even if he had and had noticed them, would have had no reason to know what wild theory the Appellant would later come up with for trial based on said markings—a theory which the Appellant himself apparently did not devise until a month after his arrest.

Furthermore, the second part of the *Trombetta* test requires that the destroyed evidence "be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Id.* at 488-89. The box itself, which was admitted into evidence and viewed by the jury, had these markings. Additionally, the Appellant had a photograph of the bottle pipe which did indeed appear to depict roman numerals carved into the side, but for whatever strategic reason he

chose not to introduce this photo and now wishes to complain that he had no way of presenting comparable evidence. The Appellant evidently assumes that the jury did not believe that the markings existed. What is just as likely is that the jury believed that the markings existed but did not attach the importance or meaning to them that the Appellant hoped they would. The items simply were not material and exculpatory evidence in that they were not "directly related to guilt or innocence." *Straka*, 116 Wn.2d 859.

Just like all of the evidence in every other case where our courts have upheld a trial court's refusal to dismiss a case, the syringes and pipe were, at best, potentially exculpatory. Furthermore, the Appellant cannot prove that Deputy Steiner was improperly motivated in his actions. The deputy was proceeding just like every other law enforcement officer in every other case in every other state across this nation proceeds: destroying dangerous hypodermic needles and an illegal device pursuant to policy. Compliance with an established policy supports good faith. *Wittenbarger*, 124 Wn.2d at 477-78. *Ortiz*, 119 Wn.2d at 302; *Trombetta*, 467 U.S. at 488; *Groth*, 163 Wn. App at 559. To argue that police should maintain an item as hazardous as dirty needles, all in the event that a defendant might later choose to identify that now-destroyed item as the

key feature of their theory at trial, is analogous to arguing that the State should not destroy a bomb planted by a defendant because it may have fingerprints or other characteristics which may exculpate said defendant.

A showing that the evidence *might* have exonerated the defendant is not enough to subject the evidence to the duty to preserve since the destruction of "potentially useful" evidence does not constitute a denial of due process unless the defendant can show bad faith on the part of the State. *Wittenbarger,* 124 Wn.2d at 475, 477 (citing *Youngblood*, 488 U.S. at 58). As defendant has failed to show that the destroyed evidence was either 1) materially exculpatory or 2) destroyed in bad faith, his due process claim fails. Dismissal is an extraordinary remedy available only when there has been prejudice to the rights of the accused which materially affected his or her rights to a fair trial. *Garza*, 99 Wn. App. 291, 994 P.2d 868 (2000). Although there is a broad range of sanctions available to trial court confronted with destruction of evidence, dismissal is appropriate sanction only if a lesser remedy is ineffective to assure fair trial. *Boyd,* 29 Wn. App. 584, 629 P.2d 930, *review denied,* 96 Wn.2d 1012 (1981). This court imposed severe limits on the ability of the State to explore the Appellant's theory of the case and the State abided by those limits.

The trial court acted well within its discretion and its decision should be upheld.

2) The trial court's decision to allow Detective Schrader to testify was not an abuse of discretion.

The State agrees that the deputy prosecutor in this case violated the omnibus order by not timely filing a witness list. However, the trial court's decision to allow the State's witnesses to testify was not an abuse of discretion.

Discovery rule CrR 4.7 (discovery—prosecutor's obligations and defendant's obligations) is designed to protect both parties against surprise. *State v. Cooper*, 26 Wash.2d 405, 174 P.2d 545 (1946). However, compliance with that rule is not mandatory, and the court may permit testimony by witnesses who have not been listed. See *State v. Jones*, 70 Wash.2d 591, 595, 424 P.2d 665 (1967) and *State v. Leosis*, 160 Wash. 176, 294 P. 1115 (1931). Reversal for noncompliance with this requirement arises from an abuse of discretion by the trial court or some substantial injury to the defendant. *State v. Jones*, supra. The trial court's discretion to allow unlisted witnesses to testify should not be overruled absent a manifest abuse of discretion. *State v. Vavra*, 33 Wash. App. 142, 143–44, 652 P.2d 959, 960–61 (1982).

Where defendant desires to avail himself of requirement that

prosecuting attorney file list of witnesses, when state sought to call witness whose name had not been given to defendant, defendant was required, in fact, to be surprised and to make timely claim, and to request continuance of trial for reasonable time to prepare for cross-examination of witness. *State v. Woods,* 3 Wash.App. 691, 477 P.2d 182 (1970); *State v. Willis*, 37 Wash.2d 274, 223 P.2d 453 (1950).

If the State fails to disclose evidence or comply with a discovery order, a defendant's constitutional right to a fair trial may be violated; as a remedy, a trial court can grant a continuance, dismiss the action, or enter another appropriate order. *State v. Barry,* 184 Wash.App. 790, 339 P.3d 200 (2014).

In this case, Detective Schrader was indicated as a potential witness as early as the original declaration regarding probable cause. "Detective Kevin Schrader with the Grays Harbor County Drug Task Force confirmed that Bailey was a known Elma-area drug dealer and that some dealers in fact sell their customers pre-loaded syringes such as the ones Bailey had." CP 3-5.

Contrary to the Appellant's argument, this witness' testimony did not deprive him of "a meaningful opportunity to argue that the syringes were for person use and not for delivery." Appellant's Brief at 29. Trial

counsel was aware of this witness from the beginning of the case and did not feel unprepared to go forward, as evidenced by the lack of a request for a continuance or time to interview the detective.

3) Defense counsel's decision not to interview Detective Schrader prior to trial was not ineffective assistance of counsel.

The Washington State Supreme Court has adopted the two prong *Strickland* test for analysis of the effectiveness of a defense counsel performance. See *State v. Jeffries*, 105 Wn.2d 398, 417, 717 P.2d 722, 733 (1986). Ineffective assistance of counsel is a fact-based determination..." *State v. Carson*, 184 Wn.2d 207, 210, 357 P.3d 1064, 1066 (2015) (citing *State v. Rhoads*, 35 Wash.App. 339, 342, 666 P.2d 400 (1983).) Appellate courts "review the entire record in determining whether a defendant received effective representation at trial." *Id.* *Strickland* explains that the defendant must first show that his counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Counsel's errors must have been so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Id.* The scrutiny of counsel's performance is guided by a presumption of effectiveness. *Id.* at 689. "Reviewing courts must be highly deferential to counsel's

performance and 'should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.'" *Carson* at 216 (quoting *Strickland* at 690.)

Secondly, the defendant must show that the deficient performance prejudiced the defense. *Strickland* at 687. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* For prejudice to be claimed there must be a showing that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The defendant bears the "heavy burden" of proof as to both prongs. *Carson* at 210. If both prongs of the test are not met than the defendant cannot claim the error resulted in a breakdown in the adversary process that renders the result unreliable. *Strickland* at 687.

While it may be ideal for defense counsel to have interviewed the detective, the Appellant cannot show that he was prejudiced by this decision. The Appellant claims that "defense's failure to interview the

deputy left the State's theory that a dealer would sell preloaded syringes utterly unrefuted." Appellant's Brief at 32. However, he does not even attempt to explain how an interview of the detective would have allowed him to refute this assertion. In the original declaration, the State referenced this fact and it is hard to imagine a witness that would testify that drug dealers don't, at least on occasion, sell preloaded syringes. It certainly was not implied that a preloaded syringe couldn't be for personal use.

The Appellant fails to meet his burden on this issue.

4) Imposition of School Bus Enhancement in this case was proper.

a. Issue was not preserved for appeal and should not be reviewed.

For the first time on appeal, the Appellant argues that imposition of the school zone enhancement was improper because there was "no proof the device police used to measure distance...was accurate." Brief of Appellant at 33. At trial, Deputy Steiner's testimony regarding his measurements came in without objection. 09/07/16 RP at 124-127.

Because the Appellant did not object at trial, he has not properly preserved the issue for appeal, and the Court should not consider it. Issues raised for the first time on appeal need not be considered unless they are manifest constitutional errors. *State v. Kirkman*, 159 Wash.2d 918, 926, 155 P.3d 125 (2007); RAP 2.5(a). Washington courts have " 'steadfastly

adhered to the rule that a litigant cannot remain silent as to claimed error during trial and later, for the first time, urge objections thereto on appeal.' " *State v. Guloy*, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985) (quoting *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wash.2d 947, 950, 425 P.2d 902 (1967)).

The Appellant heavily relies on *Bashaw;* however, at trial, Bashaw objected to the admission of the results of the measuring device based on a lack of foundation. *State v. Bashaw*, 169 Wash. 2d 133, 138, 234 P.3d 195, 198 (2010), overruled on other grounds by *State v. Nunez*, 174 Wash. 2d 707, 285 P.3d 21 (2012).

b. Failure to object was not ineffective assistance of counsel.

In this case, the defense was that the Appellant was not selling controlled substances and that he merely possessed heroin for his own use. Following that line of thought, the distance to the bus stop was irrelevant to the defense. It is a legitimate trial tactic to focus on the facts that go to whether or not the heroin was possessed for sale or personal use and to not highlight irrelevant matters.

However, any admission of this evidence was harmless error. The improper admission of evidence to support a criminal conviction may be harmless error. *State v. Flores,* 164 Wash.2d 1, 18, 186 P.3d 1038 (2008).

An evidentiary error is not harmless "if, 'within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected.' " *State v. Neal,* 144 Wash.2d 600, 611, 30 P.3d 1255 (2001) (quoting *State v. Smith,* 106 Wash.2d 772, 780, 725 P.2d 951 (1986)). In *Bashaw*, the Court found harmless error regarding the admission of the distance measurement on two of three counts. *Bashaw* at 143.

The Court found that the estimate of a Detective that a certain parking lot was 150 feet long, and several witnesses testifying that the transactions and the bus stop were contained in that parking lot, was sufficient to support the enhancement on two counts. *Id.* 143-44. The count that was found deficient had conflicting estimates of distance between 528-1,320 feet. The Court found the "testimony was conflicting but weighed in favor of finding that the distance was over 1,000 feet from the parking lot." *Id.*

In this case, Deputy Steiner testified to his own estimates of the distance based on his "pacing" off of the distances. This estimate resulted in distances within 12-13 feet of the results yielded by the wheel. Even assuming some error, both distances were considerably less than 1,000

feet. A lay witness may testify to an estimate of distance. *Baird v. Webb*, 160 Wash. 157, 161, 294 P. 1000, 1001 (1931).

5) Request for Costs

The State is not requesting appellate costs.

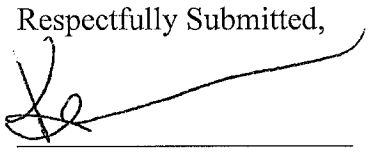
III. CONCLUSION

The trial court fashioned an appropriate remedy regarding the destruction of the four syringes by precluding the State from contesting the condition of the syringes from being anything other than that presented by the defense.

For all the reasons above, the State respectfully asks that the appeal be denied on all grounds, and that the Court affirm the verdict of the jury and the sentence imposed by the trial court.

DATED this 30th day of November, 2017.

Respectfully Submitted,



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November 30, 2017 - 4:54 PM

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Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49560-1
Appellate Court Case Title:	State of Washington, Respondent v. Zakary T. Bailey, Appellant
Superior Court Case Number:	16-1-00315-2

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