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Division II  
State of Washington  
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THE COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

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**STATE OF WASHINGTON,**

Respondent,

vs.

**BINIAM GEBREMARIEM,**

Appellant.

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Appeal from the Superior Court of Washington for Lewis County

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**Respondent's Brief**

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## I. ISSUES

- A. Did Gebremariam knowingly, intelligently, and voluntarily waive his right to counsel?
- B. Can Gebremariam raise, for the first time on appeal, the trial court's alleged failure to properly provide him with a court certified interpreter?
- C. Did Gebremariam knowingly, intelligently, and voluntarily waive his right to a jury trial?
- D. Did the State present sufficient evidence to sustain the conviction for Manufacturing Marijuana?
- E. Did the trial court impose discretionary legal financial obligations on Gebremariam without conducting the required individualized inquiry regarding his ability to pay?

## II. STATEMENT OF THE CASE

On October 25, 2016, at approximately 11:30 a.m., Deputy Jeff Godbey with the Lewis County Sheriff's Office was assisting Lewis County P.U.D. at a residence located at 786 Lincoln Creek Road in Centralia. RP<sup>1</sup> 39-40; CP 122. The P.U.D. was shutting off power to the residence. RP 41; CP 122.

Deputy Godbey followed the P.U.D. as they entered onto the property. RP 42, 71; CP 122. Deputy Godbey approached the residence to notify the occupants of what was taking place. RP 42-

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<sup>1</sup> There are four different paginated verbatim report of proceedings that were transcribed for this case. The State will refer to the bench trial proceedings and sentencing hearing, which are continually paginated as RP. The remaining hearings will have the first court date of the transcript noted in the cite, e.g. RP (1/19/17) which contains multiple hearings.

43; CP 123. Deputy Godbey has training and experience as a law enforcement officer with marijuana and marijuana grows. RP 40; CP 122. As Deputy Godbey was standing near the front door, he observed a smaller marijuana plant in a pot, multiple empty pots, and several bags of pesticide. RP 43; CP 123. Deputy Godbey also could smell an overwhelming odor of fresh marijuana. *Id.* These observations indicated to Deputy Godbey that marijuana may be growing at the residence. CP 123.

Deputy Godbey knocked on the door and was eventually able to contact Gebremariam. RP 43-44CP 123. Gebremariam was the sole occupant of the residence. RP 47; CP 123. Gebremariam appeared to have just woken up. RP 44; CP 123. The odor of marijuana became even stronger after the front door opened. *Id.*

Deputy Godbey observed through the opened front door marijuana plants hanging in the living room, drying. RP 44; CP 123. Drying marijuana is part of the manufacturing process. *Id.*

Gebremariam identified himself with a Washington State driver's license. CP 123. Gebremariam told Deputy Godbey that Gebremariam had just come from Seattle a week earlier, he was working on the property, and was planning on staying at the residence until Christmas. RP 45; CP 123.

Gebremariam granted consent for Deputy Godbey to enter the residence as Gebremariam retrieved his cell phone from the back bedroom. RP 46; CP 123. In order to enter the residence, Deputy Godbey was required to duck under the hanging marijuana. *Id.* Deputy Godbey was able to observe a grow room in the residence that had several marijuana plants in pots, as well as other equipment and lights used to grow marijuana. RP 47; CP 123.

Deputy Godbey asked Gebremariam for consent to search the property, which was denied. RP 47; CP 123. Gebremariam asked to go to the bathroom and allowed Deputy Godbey to follow him behind the residence. RP 47-48; CP 124. Behind the residence Deputy Godbey observed two greenhouses that were empty. RP 48; CP 124. Deputy Godbey also observed behind the residence dozens of empty planter pots, as well as other planter pots that still had soil in them, along with marijuana stalks that appeared to have recently been harvested. *Id.*

There was also a detached shop behind the residence. RP 50; CP 124. Deputy Godbey requested assistance from Deputy Van Wyck and Detective Schlecht due to Deputy Godbey's belief there was a marijuana grow operation at the residence. RP 49; CP 124. Detective Schlecht is with the Joint Narcotics Enforcement Team

(JNET) and has training and experience with marijuana and marijuana grows. RP 92-94; CP 124.

Upon their arrival, Deputy Godbey informed Deputy VanWyck and Detective Schlecht of his observations. RP 20; CP 124. Detective Schlecht applied for, and was granted, a telephonic search warrant. RP 98; CP 124. The officers recovered 309 marijuana plants from the residence and shop area. RP 99; CP 124.

The detached shop behind the residence contained marijuana growing equipment and what appeared to be harvested plants. RP 99; CP 124. The marijuana growing equipment in the shop included grow lights and covers for the windows. *Id.* Inside the shop, marijuana was also observed hanging and drying. *Id.*

In the residence officers found growing equipment that included growing pots, chemicals, and trimming equipment. RP 23; 98; CP 124. Additional hanging, drying marijuana was observed and collected from the residence. RP 24, 98; CP 124. The garage contained additional growing marijuana plants in pots. RP 23-24, 99; CP 124. Marijuana growing lights were also observed during the execution of the warrant. RP 24; CP 124.

Officers did not locate any medical authorization for growing marijuana. RP 62, 102-04; CP 125. At no time during the pendency

of the case has medical authorization to grow marijuana been provided to law enforcement. RP 62, 102-03; CP 125.

A representative sample of marijuana seized from the residence was sent to the crime lab for testing. RP 149; CP 125. The sample was sent to the Washington State Patrol Crime Laboratory. *Id.* The sample was retrieved and tested by Catherine Dunn, a Forensic scientist with the Washington State Patrol Crime Lab. RP 157; CP 125. The results of these tests indicated that the total tetrahydrocannabinol (THC) concentration of the sample was above 0.3 percent. RP 165; CP 125. The total amount of THC in the sample was determined to be over 20 percent. RP 173; CP 125.

The State charged Gebremariam with Count I: Manufacturing Marijuana and Count II: Maintaining Premises or Vehicle for Using Controlled Substances. CP 1-2. Gebremariam elected to proceed without counsel after being given the assistance of court appointed counsel and offered standby counsel. RP (11/17/16) 2-9. Gebremariam, who is not a native English speaking defendant, also had issues with the interpreters employed by the trial court to assist him, was antagonistic with the interpreters to the point where the interpreters refused to participate in the proceedings. See RP 12/22/16).

Gebremariam waived his right to a jury trial and proceeded pro se to a trial by the bench. RP 8-11. The State dismissed Count II: Maintaining Premises or Vehicle for Using Controlled Substances. RP 192. The trial court found Gebremariam guilty of Manufacturing Marijuana, as charged in Count I. RP 196; CP 125-26. Gebremariam was sentenced to 30 days in jail. CP 108. Gebremariam timely appeals his conviction. CP 121.

The State will supplement the facts as necessary throughout its argument below.

### **III. ARGUMENT**

#### **A. GEBREMARIEM KNOWINGLY, INTELLIGENTLY, AND VOLUNTARILY WAIVED HIS RIGHT TO COUNSEL.**

Gebremariam argues he did not knowingly, intelligently, and voluntarily waive his right to counsel. Brief of Appellant 12-15. Gebremariam asserts due to not being native to the United States, he may have had a limited understanding of the legal system in the United States. Further, according to Gebremariam, due to English not being Gebremariam's native language, and the fact that he was without an interpreter, this is further evidence that his waiver was not knowing, intelligent, or voluntary.

While acknowledging that Gebremariam is not native to the United States, when reviewing the record in its entirety,

Gebremariam's waiver of counsel was knowing, voluntary and intelligently made.

The Sixth Amendment grants a criminal defendant the right to self-representation. *Faretta v. California*, 422 U.S. 806, 572-74, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). "The right to defend is given directly to the accused; for it is he who suffers the consequences if the defense fails." *Faretta*, 422 U.S. at 572-73. The Washington State Constitution also expressly guarantees a criminal defendant the right to self-representation. *State v. Breedlove*, 79 Wn. App. 101, 105-06, 900 P.2d 586 (1995).

The right to self-representation "is so fundamental that it is afforded despite its potentially detrimental impact on both the defendant and the administration of justice." *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714 (2010), *citing Faretta* 422 U.S. at 834; *State v. Vermillion*, 112 Wn. App. 844, 51 P.3d 188 (2002). An improper denial of the right to self-representation cannot be harmless and requires reversal. *Madsen*, 168 Wn.2d at 503; *Vermillion*, 112 Wn. App. at 851, *citing McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8, 104 S. Ct. 944, 79 L. Ed. 2d 122 (1984).

The trial court is "required to indulge in every reasonable presumption against a defendant's waiver of his or her right to

counsel.” *Madsen*, 168 Wn.2d at 503 (internal quotations and citations omitted). A defendant does not have an absolute or self-executing right to proceed pro se. *Id.* at 504. When a defendant makes a request to proceed pro se the trial court first must determine whether the request is timely and unequivocal. *Id.* If the trial court finds the request is unequivocal and timely it must then determine if the waiver of the right to counsel is knowing, voluntary, and intelligent. *Id.*

If the court finds the request to self-represent “untimely, unequivocal, involuntary, or made without a general understanding of the consequences... [s]uch a finding must be based on some identifiable fact...” *Id.* at 504-05. It is not proper for a judge to deny a request to self-represent out of concern for the defendant’s competency because if the trial court doubts a defendant’s competence the court needs to take the necessary action in regards to a competency review. *Id.* at 505.

The trial court, prior to accepting a defendant’s waiver of counsel, must inform the defendant of the disadvantages and dangers of self-representation. *State v. Dougherty*, 33 Wn. App. 466, 469, 655 P.2d 1187 (1982), *citing Faretta*, 422 U.S. at 835. The

record must establish that the defendant “knows what he is doing and his choice is made with eyes open.” *Id.*

“The validity of a defendant’s waiver of counsel is an issue which depends upon the particular facts and circumstances of each case.” *State v. Imus*, 37 Wn. App. 170, 173, 679 P.2d 376 (1984), citing *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). Factors such as intelligence and literacy may impact some defendant’s ability to knowingly and intelligently understand the importance of his or her decision to proceed without an attorney to assist them. *Imus*, Wn. App. at 178. Yet, being unable to read or being of lower intelligence does not preclude a person from self-representation. *Id.* Further,

A court may not deny a motion for self-representation based on the grounds that self-representation would be detrimental to the defendant’s case or concerns that courtroom proceedings will be less efficient and orderly than if the defendant was represented by counsel.

*Madsen*, 168 Wn.2d at 505.

On November 17, 2016 Gebremariam unequivocally requested to represent himself. RP (11/17/16) 2-5, 7-9. At the beginning of the hearing Gebremariam’s court appointed attorney, Mr. Arcuri, was unable to initially address the trial court because Gebremariam kept speaking on his own behalf and at one point

stated, “He don’t represent me, though.” RP (11/17/16) 2. Mr. Arcuri then informed the trial court, “I think the defendant is talking because he doesn’t want me to talk....At one point in time he professed not to need my services, not to want my services as a lawyer.” *Id.* at 3. Mr. Arcuri went on to explain, “I tried to explain to him that I was appointed by the Court and it was my obligation to represent him unless and until the court removed me from the case, at which time he said that was his desire....I also understand that Mr. Gebremariam may be asking to represent himself.” *Id.* at 4.

The trial court then asked Gebremariam if he wanted to represent himself on this case. *Id.* Gebremariam’s response was, “Yeah. I’m present, sir.” *Id.* Gebremariam then stated, “Yes, sir.” *Id.* The trial court wanted clarification, because “I’m present” did not answer the trial court’s question. *Id.* 5. Gebremariam stated, “I don’t - - yeah, I don’t want him. I don’t need attorney.” *Id.* The trial court then inquired further, “Okay, So you don’t need an attorney at all; is that correct?” *Id.* Gebremariam responded, “Yes, that’s right.” The trial court then asked, “So that means you want to represent yourself? You want to be your own attorney?” *Id.* Gebremariam responded, “Yeah.” *Id.*

The trial court later went through following:

THE COURT: All right. So since you're representing yourself, want to represent yourself, I want to make sure that you understand that there are some real disadvantages to representing yourself because you have to understand the rules of evidence, on how to present a case, how to present evidence. Are you familiar with any of those things?

MR. GEBREMARIEM: I'm familiar. If not, I will request some -- I will just -- yeah, I'll request some other person to just help me with finding the process. But I'm confident to defend myself.

THE COURT: All right. So you want somebody to help you with the paperwork? Is that what you're saying?

MR. GEBREMARIEM: The paperwork, whenever I need some filing legal papers, yeah, I can just request somebody else.

THE COURT: All right. Well, what I would do to satisfy that request is I would appoint standby counsel where you would represent yourself, I would appoint Mr. Arcuri just as standby counsel to sit back, he doesn't do anything, he doesn't ask questions, he doesn't make objections, he doesn't do anything, he sits back unless you have a question for him on a procedure or you have a document that you would like to get filed. He can answer those questions for you as an assistant for you.

MR. GEBREMARIEM: I can find somebody else by myself, though.

THE COURT: Well, it's going to -- are you going to hire somebody to be an assistant?

MR. GEBREMARIEM: Probably, yeah. Yeah, I got to hire somebody.

THE COURT: Well, that somebody has to be an attorney. Do you understand that?

MR. GEBREMARIEM: Yeah, yeah. But I got to defend myself but yeah, legal papers, yeah, I got to hire somebody.

THE COURT: All right. As long as that person is an attorney.

MR. GEBREMARIEM: [Nods head.]

THE COURT: Do you understand that?

MR. GEBREMARIEM: Yeah, I understand that, sir.

THE COURT: All right. And you're satisfied that you're willing to take those risks of representing yourself?

MR. GEBREMARIEM: I do.

THE COURT: All right. I will allow you to proceed with that for right now. And I'm not going to appoint Mr. Arcuri as standby counsel based on your statement that you are going to hire an attorney to stand by with you. All right?

MR. GEBREMARIEM: Yeah.

*Id.* 7-9.

Gebremariam's request to proceed pro se was timely and unequivocal. Gebremariam clearly told the trial court that Mr. Arcuri did not represent him, he did not want Mr. Arcuri, he did not need an attorney, and Gebremariam was going to represent himself. RP (11/17/16) 2-5. The colloquy done by the trial court on November 17, 2016 was sufficient for a knowing, voluntary, and intelligent waiver of counsel. The trial court informed Gebremariam of the perils of

proceeding without an attorney. *Id.* at 7. The trial court talked to Gebremariam about the disadvantages, such as knowing the rules of evidence, how to present evidence, and how to present his case. *Id.* The trial court also offered to appoint standby counsel to assist Gabremariam in his defense. *Id.* at 8. The trial court explained how standby counsel worked and Gebremariam still insisted upon representing himself, without court appointed standby counsel. *Id.* at 8-9. Gebremariam insisted he would hire an attorney to assist on any matters for which he needed assistance. *Id.*

Gebremariam has a Sixth Amendment right to represent himself, even if it is to his detriment. Gebremarmiem has the right to hire his own standby counsel if he so chooses. The trial court's inquiry of Gebremariam was sufficient to show an intelligent, knowing, and voluntary waiver of counsel. English may not be Gebremariam's first language but he clearly understood his rights and unequivocally did not want court appointed counsel, or any counsel at that time, to assist him. Gebremariam was willing to take the risks outlined by the trial court to represent himself. This Court should find Gebremariam's waiver of counsel was unequivocal and was knowing, voluntary and intelligently made. This Court should affirm Gebremariam's conviction and sentence.

**B. GEBREMARIEM CANNOT RAISE, FOR THE FIRST TIME ON APPEAL, THE TRIAL COURT'S ALLEGED FAILURE TO PROPERLY PROVIDE HIM WITH A COURT CERTIFIED INTERPRETER, AS IT IS NOT A MANIFEST CONSTITUTIONAL ERROR.**

For the first time on appeal, Gebremariam argues that the trial court violated his constitutional right to have an interpreter. Brief of Appellant 15-18. Gebremariam argues he was summarily denied an interpreter after a hearing where he repeatedly questioned an interpreter's credentials. Gebremariam further argues he never knowingly, intelligently, or voluntarily waived his right to an interpreter. Gebremariam asserts this Court must reverse and remand for a new trial. The alleged error, while constitutional in magnitude, was not manifest, as there is no error. Even if error did occur, Gebremariam has not shown actual prejudice, therefore, Gebremariam may not raise it for the first time on appeal.

**1. Standard Of Review.**

A claim of a manifest constitutional error is reviewed de novo. *State v. Edwards*, 169 Wn. App. 561, 566, 280 P.3d 1152 (2012). The appointment, or lack thereof, of an interpreter is reviewed under an abuse of discretion standard. *State v. Gonzales-Morales*, 138 Wn.2d 374, 381, 979 P.2d 826 (1999).

“A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *State v. C.J.*, 148 Wn.2d 672, 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997). This Court will find a trial court abused its discretion “only when no reasonable judge would have reached the same conclusion.” *State v. Rodriguez*, 146 Wn.2d 260, 269, 45 P.3d 541 (2002) (internal quotations and citation omitted).

**2. Gebremariam Did Not Argue Below That The Trial Court Was Improperly Proceeding Without An Interpreter, In Violation Of His Constitutional Rights, Therefore, Gebremariam Must Demonstrate That The Error Is A Manifest Constitutional Error.**

Gebremariam did not raise the constitutionality of the lack of an interpreter, or further object to proceeding without an interpreter in hearings subsequent to December 22, 2016. See RP (12/22/16); RP (1/19/17); RP. An appellate court generally will not consider an issue that a party raises for the first time on appeal. RAP 2.5(a); *State v. O’Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009); *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The origins of this rule come from the principle that it is the obligation of trial counsel to seek a remedy for errors as they arise. *O’Hara*, 167 Wn.2d at 98. The exception to this rule is “when the claimed error is

a manifest error affecting a constitutional right.” *Id.*, citing RAP 2.5(a). There is a two-part test in determining whether the assigned error may be raised for the first time on appeal, “an appellant must demonstrate (1) the error is manifest, and (2) the error is truly of constitutional dimension.” *Id.* (*citations omitted*).

The reviewing court analyzes the alleged error and does not assume it is of constitutional magnitude. *Id.* The alleged error must be assessed to make a determination of whether a constitutional interest is implicated. *Id.* If an alleged error is found to be of constitutional magnitude the reviewing court must then determine whether the alleged error is manifest. *Id.* at 99; *McFarland*, 127 Wn.2d at 333. An error is manifest if the appellant can show actual prejudice. *O’Hara*, 167 Wn.2d at 99. The appellant must show that the alleged error had an identifiable and practical consequence in the trial. *Id.* There must be a sufficient record for the reviewing court to determine the merits of the alleged error. *Id.* (*citations omitted*). No prejudice is shown if the necessary facts to adjudicate the alleged error are not part of the record on appeal. *McFarland*, 127 Wn.2d at 333. Without prejudice the error is not manifest. *Id.*

During the December 22, 2016 hearing Gebremariam argued, after causing two separate interpreters from LanguageLink<sup>2</sup> to hang up mid proceedings, that he did not understand the proceedings because he could not continue without an interpreter. RP (12/22/16) 2-16; Supp. CP 12/22/16 Minutes. Gebremariam during the December 22, 2016 hearing asked for an interpreter to assist him after the debacle with the two interpreters hanging up. RP 16-17. The trial court pointed out to Gebremariam that it had given him three (one was in a previous hearing on December 15, 2016). RP (12/22/16) 16-17; Supp. CP 12/15/16 Minutes. Gebremariam argued the three provided had all hung up because they did not want to interpret for him. RP (12/22/16) 16-17. There was arguing with the trial court about how the hearing would proceed. RP (12/22/17)17-18. The hearing was terminated and Gebremariam was held in contempt. *Id.* at 18.

After this hearing, in subsequent hearings and at his bench trial, the issue of an interpreter was not brought up again by Gebremariam. See RP; RP (1/19/17). Gebremariam represented himself in all subsequent hearings and at his trial, speaking directly

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<sup>2</sup> The State will be filing a Supplemental Designation of Clerk's Papers which includes the Clerk's minutes for the 12/22/17 and 12/15/17 hearings.

to the deputy prosecutor and the trial court. *Id.* Therefore, Gebremariam has the burden of proving the alleged error was of constitutional magnitude and manifest.

**a. The alleged error is of constitutional magnitude.**

A non-English speaking criminal defendant has a constitutional and statutory right to the assistance of an interpreter. U.S. Const. amend. VI; RCW 2.43.030. A criminal defendant's constitutional right to an interpreter is derived from the right to participate in the proceedings and confront and examine witnesses. *State v. Aliaffar*, 198 Wn. App. 75, 83, 392 P.3d 1070 (2017), *citing Gonzales-Morales*, 138 Wn.2d at 378-79. The right to a court certified interpreter is a right that is conferred by statutory authority, not the constitution. *Aliaffar*, 198 Wn. App. at 83, *citing State v. Tuoc Ba Pham*, 75 Wn. App. 626, 633, 879 P.2d 321 (1994); *See also* RCW 2.43.030. A court is to use a certified interpreter unless good cause is found by the court, and noted in the record by the court. RCW 2.43.030(1)(b).

Therefore, the alleged error, failing to provide an interpreter, is of constitutional magnitude. Gebremariam still must show that the error was manifest. *State v. Knutz*, 161 Wn. App. 395, 406-07, 253 P.3d 437 (2011).

**b. The alleged error is not manifest because no error occurred and therefore, Gebremariam was not prejudiced.**

Gebremariam cannot meet the necessary burden of showing his alleged error, failing to provide a certified interpreter for his court proceedings, actually prejudiced him. An error is manifest if a defendant can show actual prejudice. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Actual prejudice requires a defendant to make a “plausible showing... that the asserted error had practical and identifiable consequences in the trial of the case.” *O’Hara*, 167 Wn.2d at 99 (internal citations and quotations omitted).

The State acknowledges that English is not Gebremariam’s first language. The State also acknowledges that Gebremariam requested the services of an interpreter to interpret the court proceedings into Tigrinya for him. See RP (12/22/16). The State will also acknowledge that the evaluator for Gebremariam’s competency evaluation recommended Gebremariam be provided a court-certified interpreter to assist in the court proceedings. CP 26. In that same evaluation it was revealed that Gebremariam began to learn English in the second grade, with most of his classes taught in English after that point. CP 22. It was also revealed Gebremariam had been in the United States since 2010, had been predominately employed doing

customer service related jobs, and attended a year of community college. *Id.*

Gebremariam was furnished with three separate, qualified interpreters from LanguageLink, a service that provides certified interpreters telephonically. Supp. CP (12/15/16) Minutes; Supp. CP (12/22/16) Minutes; CTS LanguageLink.<sup>3</sup> The interpreters were noted in the record, including the original interpreter's name and number for the December 22, 2016 hearing. Supp. CP (12/22/16) Minutes. Gebremariam was argumentative with each of the interpreters to the point where they hung up on the trial court mid-proceedings. RP (12/22/16); Supp. CP (12/15/16) Minutes; Supp. CP (12/22/16) Minutes.

Gebremariam insisted on representing himself in the proceedings. RP (11/17/16) 9. It is clear during the December 22, 2016 omnibus hearing part of Gebremariam's frustration was that he did not like that the Tigrinya interpreter was not giving "omnibus" a different name, or explaining the legal terminology, when he translated it, as it is a term of art in American criminal jurisprudence. RP (12/22/16) 10-15. Neither the trial court, nor the interpreter, can

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<sup>3</sup> [http://www.ctslanguagelink.com/opi\\_industries.php#Court](http://www.ctslanguagelink.com/opi_industries.php#Court) (last visited 11/20/17)

give Gebremariam legal advice, which Gebremariam was advised.  
*Id.* at 14-15.

After the December 22, 2016 omnibus hearing ended disastrously, subsequent court hearings ran smoothly, with Gebremariam representing himself without the aid of an interpreter. See RP; RP (1/19/17). The State does not know exactly how this all came to pass, as the record is not sufficient for review on this issue. It is Gebremariam's duty to have all portions of the verbatim report of proceedings transcribed that are necessary to review the issues he raises on review. RAP 9.2(b). Gebremariam did not have the hearing immediately following the December 22, 2016 hearing transcribed. Supp. CP (12/23/16) Minutes. Apparently at the hearing Gebremariam's contempt was purged, there was discussion about discovery matters, and a new omnibus date was set. *Id.* This Court must have a sufficient record to review the merits of the alleged error. *O'Hara*, 167 Wn.2d at 99. There is no prejudice without the necessary facts to adjudicate the alleged error. *Id.* Gebremariam has not supplied this Court with a complete record on review sufficient to adequately adjudicate his claimed error of the trial court's failure to provide an interpreter. Without prejudice there is no error.

If this Court decides there is a sufficient record to review the error, the following trial court proceedings, including the bench trial and the prolific motions and legal documents filed by Gebremariam acting in his own defense, show that he was competent and able to understand English and did not require the assistance of an interpreter. Gebremariam represented himself at the omnibus hearing. RP (1/19/17) 2-12. Gebremariam was able to go over the requirements that the State gave him all the discovery and assert his legal motions, even if they were not successful. *Id.* At the next hearing Gebremariam objected to the State's continuance. RP (1/19/17) 15-18. Gebremariam also waived his right to a jury trial. *Id.* at 19-21. Also, Gebremariam brought a written motion, which was granted regarding his release conditions. *Id.* at 22-23; CP 78-80.

Gebremariam cross-examined the witnesses at his trial, eliciting responses to aid in his defense. RP 30-36, 65-88, 104-05, 128-135. Gebremariam raised objections at trial. RP 51-61, 114-15. Even if Gebremariam was ultimately unsuccessful, this does not mean it was due to his English speaking and understanding capabilities. The State's case was strong; the evidence was such that even represented by an attorney it is highly likely Gebremariam would have been convicted.

Gebremariam cannot show actual prejudice on this record. Gebremariam did not provide a sufficient record for review. If this Court finds the record sufficient, Gebremariam's numerous legal filings and his performance in the courtroom show his English speaking capabilities were proficient for these proceedings. This Court should find there was not a manifest constitutional error that can be raised for the first time on appeal and affirm Gebremariam's conviction.

**C. GEBREMARIEM KNOWINGLY, VOLUNTARILY, AND INTELLIGENTLY WAIVED HIS RIGHT TO A JURY TRIAL.**

Gebremariam executed a knowing, voluntary, and intelligent waiver of his right to a jury trial. Gebremariam informed the trial court in writing and verbally he desired a trial to the bench, not to a jury.

**1. Standard Of Review.**

Validity of a jury trial waiver is also reviewed de novo. *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001); *affirmed* 148 Wn.2d 303, 59 P.3d 648 (2002).

**2. Gebremariam Executed A Knowing, Voluntary, And Intelligent Waiver Of His Right To Have His Case Tried To A Jury.**

A criminal defendant has a constitutional right to a trial by jury. U.S. Const. amend. VI; Const. art. 1, § 21 and § 22. Washington's

state constitutional right to a jury trial is broader than the federal constitutional right to a jury trial. *State v. Pierce*, 134 Wn. App. 763, 770, 142 P.3d 363 (2006).

The State has the burden of establishing that a defendant validly waived his or her right to a jury trial. *State v. Hos*, 154 Wn. App. 238, 249, 225 P.3d 389 (2010). The reviewing court “will indulge every reasonable presumption against such waiver, absent a sufficient record. *Hos*, 154 Wn. App. at 249-50.

The reviewing court considers if the defendant was advised of his constitutional right to have his case tried to a jury. *Pierce*, 134 Wn. App. at 771. The court also examines the facts and circumstances of the case and the waiver, including a defendant’s experience and capabilities. *Id.* If a defendant signs a written waiver of his right to a jury trial, as required by CrR 6.1(a), “it is strong evidence that the defendant validly waived the jury trial right: but it is not determinative. *Id.* While a trial court is not required to have a colloquy with the defendant regarding the waiver of his jury trial right, personal expression of the waiver from the defendant is required. *Id.*, citing *State v. Stegall*, 124 Wn.2d 719, 725, 88 P.2d 979 (1994).

Gebremariam argues to this Court that he did not knowingly, intelligently, and voluntarily waive his right to a jury trial, as evidenced

by his piecemeal recitation of discussions of his right to a jury trial with the trial court. Brief of Appellant 19-20. This is simply not the case when looking at the entire record in context.

Gebremariam filed a notice for a demand for a trial by the court on February 8, 2017. CP 76-77. The demand cited the civil rule, CR 39, regarding trials to the bench versus trial by a jury. CP 77. It is nonetheless clear that Gebremariam was attempting to assert his right to a trial by a judge, not a jury, in the notice for a demand for a trial by the court, which he signed. CP 77.

The trial court asked Gebremariam about the demand for a trial by the court at a hearing on February 9, 2017. RP (1/1917) 19. The trial court stated, "it appears to me that you are attempting to waive a jury trial and ask for a bench trial? Is that what you are asking." *Id.* Gebremariam indicated that was indeed the case. *Id.* Later the trial court and Gebremariam had the following exchange:

THE COURT: Okay. Do you have a waiver of a jury trial?

MR. GEBREMARIEM: I do.

THE COURT: Okay. All right. So you understand you have a constitutional right to have your case heard by a jury of twelve Lewis County citizens? You understand that, right?

MR. GEBREMARIEM: I don't understand. I understand you're the judge –

THE COURT: Well, it is a constitutional right that you have. But if you are telling me you want to waive that right and have your case heard by a judge, I can do that.

MR. GEBREMARIEM: Yes. Yeah. I would like it to be by the judge.

THE COURT: Okay. We will do that. So we will set it for a bench trial.

MR. GEBREMARIEM: Yeah. I got to have my freedom, you know.

THE COURT: Okay.

MR. GEBREMARIEM: I just want a judge to be sitting on.

*Id.* at 20-21.

Then again, on the day of trial, the trial judge went through with Gebremariam his right to a jury trial. RP 9-11. The following exchange occurred between the trial judge and Gebremariam:

THE COURT: Oh, okay. So, yeah, let's revisit that. Mr. Gebremariam, you understand that you have a right to proceed in this case with a jury trial, with 12 jurors deciding this case? You understand that?

MR. GEBREMARIEM: Yeah.

THE COURT: All right. And it's my understanding that you made the choice to have this case decided not by a jury but by a judge –

MR. GEBREMARIEM: Yes, sir.

THE COURT: -- sitting alone.

MR. GEBREMARIEM: Yeah.

THE COURT: And that's your choice?

MR. GEBREMARIEM: That's my choice.

THE COURT: All right. You understand that there can be some advantages to having a jury? And primarily, that advantage to you would be that the State would have to convince 12 people of your guilt before you could be convicted if a jury is deciding the case. If a judge is hearing the case, then the prosecutor only has to convince one person, that's me. All right? Do you understand that difference?

MR. GEBREMARIEM: I understand, yeah.

THE COURT: All right.

MR. GEBREMARIEM: That's why I choose that because the judge [unintelligible] freedom.

THE COURT: Okay.

MR. GEBREMARIEM: Yeah.

THE COURT: All right. And there are some -- I guess there's some advantages of having a judge trial and that is procedurally it can be easier because you're not having to deal with the complications of a jury. So that's something that kind of weighs in the other direction. So after considering all of those things, you're comfortable with that and you still want to proceed with going with a bench trial, just having me decide it rather than a jury?

MR. GEBREMARIEM: Yes, yeah.

RP 9-10. The trial court then had Gebremariam sign a written waiver of jury trial. RP 10-11; CP 104.

Gebremariam's own notice, his two exchanges with two different judges, and the written waiver he signed waiving his right to a jury trial are ample evidence for this Court to find Gebremariam knowingly, voluntarily, and intelligently waived his right to a jury trial. Gebremariam was twice informed he had a constitutional right to a jury trial. Gebremariam twice signed paperwork indicating he wanted a trial by judge, once as a demand, the other as a waiver of jury trial. Gebremariam repeatedly stated he wanted a trial by the judge. This Court should find Gebremariam's jury trial waiver valid and affirm his conviction.

**D. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE TRIAL COURT'S FINDING THAT GEBREMARIEM COMMITTED THE CRIME OF MANUFACTURING MARIJUANA.**

Contrary to Gebremariam's assertion, the State did prove that he manufactured marijuana. Gebremariam argues there was no evidence presented regarding who owned the residence and nothing more than the proximity was offered in regards to Gebremariam's conduct at the residence. Brief of Appellant 21-22. Gebremariam glosses over the facts and ignores much of the evidence presented. This Court should find the State presented sufficient evidence to sustain the trial court's finding of guilty for Manufacturing Marijuana and affirm the conviction.

### **1. Standard Of Review.**

Sufficiency of evidence following a bench trial is reviewed for “whether substantial evidence supports the challenged findings of fact and whether the findings support the trial court’s conclusions of law.” *State v. Smith*, 185 Wn. App. 945, 956, 344 P.3d 1244 (2015) (citation omitted). Unchallenged findings are verities on appeal. *State v. Lohr*, 164 Wn. App. 414, 418, 263 P.3d 1287 (2011).

### **2. The Trial Court’s Conclusion That Gebremariam Manufactured Marijuana Is Supported By The Evidence.**

The State is required under the Due Process Clause to prove all the necessary elements of the crime charged beyond a reasonable doubt. U.S. Const. amend. XIV, § 1; *In re Winship*, 397 U.S. 358, 362-65, 90 S. Ct 1068, 25 L.Ed.2d 368 (1970); *State v. Colquitt*, 133 Wn. App. 789, 796, 137 P.3d 893 (2006). An appellant challenging the sufficiency of evidence presented at a trial “admits the truth of the State’s evidence” and all reasonable inferences therefrom are drawn in favor of the State. *State v. Goodman*, 150 Wn.2d 774, 781, 83 P.2d 410 (2004). When examining the sufficiency of the evidence, circumstantial evidence is just as reliable as direct evidence. *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99 (1980).

“Substantial evidence is evidence sufficient to persuade a fair-minded, rational person that the findings are true.” *Smith*, 185 Wn. App. at 956 (citation omitted). The reviewing court defers to the trier of fact on issues regarding witness credibility, conflicting testimony, and persuasiveness of the evidence presented. *State v. Thomas*, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004).

Gebremariam does not assign error or challenge a single finding of fact, therefore, all of the trial court’s findings of fact are verities on appeal. *Lohr*, 164 Wn. App. at 418; See CP 122

To convict Gebremariam of Manufacturing Marijuana, the State was required to prove, beyond a reasonable doubt, that Gebremariam, on or about October 25, 2016, in the State of Washington, did knowingly manufacture marijuana. RCW 69.50.401(2)(c); CP 1.

"Manufacture" means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance, either directly or indirectly or by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container.

RCW 69.50.010(v).

Gebremariam was the sole occupant of a home that was housing a large scale marijuana grow operation. RP 23-24, 43-50, 61, 63, 98-99; Ex 17.<sup>4</sup> There was one bedroom that was operational as actual living quarters, and it belonged to Gebremariam. RP 99. Gebremariam's credit card was located in the bedroom. RP 99.

Gebremariam told Detective Schlecht that he did not know anything about the marijuana. RP 98. Deputy Godbey also asked Gebremariam about the marijuana. RP 45. Gebremariam told Deputy Godbey that Deputy Godbey would need to talk with Mike. RP 46. Gebremariam gave Deputy Godbey a phone number for Mike. RP 46.

Gebremariam told Detective Schlecht that he did not know anything about authorizations, that Mike knew about that. RP 96. Marijuana is both legal and not legal. RP 104. A person can only grow marijuana if properly licensed. RP 104. Officers did not locate any documentation in the home. RP 62, 105. Deputy Godbey was not provided with any authorization for Gebremariam to grow marijuana. RP 63. Detective Schlecht also contacted the Liquor

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<sup>4</sup> The State will be submitting a Supplemental Statement of Clerk's Papers to include a number of exhibits from the bench trial. The State will cite these as Ex and their exhibit number.

Cannabis Board and they did not have any documentation on the home either. RP 105.

The smell of the odor of marijuana was strong from outside the front door of the residence. RP 21, 43, 97. Marijuana is not a simple houseplant that can be shoved in a window and watered once a week. RP 93. Marijuana needs constant attention, a lot of light, humidity, and constant fertilizer to properly grow. RP 94. Gebremariam told Deputy Godbey that he had arrived at the property a week earlier. RP 45. Gebremariam also told Deputy Godbey he was at the property to work and was going to be there until Christmastime. RP 45.

When officers executed the search warrant they had to physically duck down under drying marijuana plants to walk around the residence. RP 51, 98; Ex 1, 2, 3, 4, 5. There were two active growing rooms and one room that contained equipment for growing marijuana. RP 98. The equipment being used and stored included large lights, ballasts, air purifying machines, and large tubes to funnel air. RP 98. There were two large keg sized tanks of liquid in the kitchen. RP 23. There were no furnishings in the residence that would indicate someone was living there. RP 23. There was also an active grow in the garage. RP 59, 99; Ex 6, 7, 11, 12, 13.

Officers also found marijuana in a locked outbuilding. RP 99, 143. The officers used a key from Gebremariam's key ring to open the outbuilding. RP 143. The keyring also included the key to Gebremariam's Volkswagen that was located in driveway. RP 42, 89, 143.

A representative sample of the marijuana collected from the residence, stored, and then dried was sent to the Washington State Patrol Crime Laboratory for testing. RP 149-53, 157-58, 165. The marijuana sent to the WSP Crime Laboratory contained approximately 21 percent total THC content. RCW 175.

Gebremariam argues there was no evidence presented about who owned or rented the residence. Brief of Appellant 21. This is not correct. There was testimony by Deputy Godbey on cross-examination by Gebremariam that the property appeared to be owned by a corporation – possibly Highland Investment, LLC. RP 67.

Ownership of the residence where marijuana is manufactured is not an element of the crime of Manufacturing Marijuana. RCW 69.50.101(v); RCW 69.50.401. "The relationship of the manufacturer to the manufacturing location is not relevant to the charge of manufacturing of a controlled substance." *State v. Bryant*, 78 Wn. App. 805, 810, 901 P.2d 1046 (1995). Bryant had been previously

tried and acquitted of the charge of manufacturing marijuana, count I, and the jury was unable to reach a verdict on count II, making a building available for the manufacture of controlled substance. *Bryant*, 78 Wn. App. at 807. The State then prosecuted Bryant again for count II. *Id.* Bryant argued double jeopardy precluded him from being convicted of making a building available for the manufacture of a controlled substance. *Id.* at 808-09. This Court rejected that argument because manufacturing is not the same as making a building available, as noted above. *Id.* 809-11.

Gebremariam argues his case is analogous to *State v. Enlow*, 143 Wn. App. 463, 178 P.3d 366 (2008), due to the lack of fingerprints showing that he touched any items related to the grow and Gebremariam simply being just present at the grow operation. Brief of Appellant 21-22. Gebremariam grossly understates the evidence, forgetting key pieces of it, and drawing similarities to *Enlow* are misplaced.

The police located Enlow hiding in the bed of a truck. *Enlow*, 143 Wn. App. at 466. The truck contained a number of items used in the manufacturing of methamphetamine. *Id.* The truck did not belong to Enlow. *Id.* The truck was parked outside a residence where police were executing a search warrant. *Id.* Enlow did not live at the

residence where the search warrant was being served. *Id.* Enlow's fingerprints were on some item's but not on item's that contained methamphetamine or were used to manufacture methamphetamine. *Id.* Enlow's conviction for manufacturing methamphetamine was reversed for insufficient evidence, citing in part mere proximity is not enough to infer constructive possession. *Id.* at 469-70. The Court cited to the lack of evidence of fingerprints and that Enlow was not the owner or renter of the residence. *Id.*

Gebremariam's situation is different than that in *Enlow*. Marijuana needs constant attention to grow properly and Gebremariam was the sole occupant of a residence used for a large scale marijuana grow. 93-94, 98-99. Gebremariam was living at the residence, which he admitted and was evidenced by Gebremariam's personal belongings being in the only livable room in the residence, a single bedroom. RP 45, 47, 99. To physically move around the residence one had to duck under drying marijuana plants, including to enter the residence. RP 97-98. The key to the locked outbuilding where more marijuana was being grown and dried was on Gebremariam's keyring. RP 99, 143. This evidence is sufficient to prove Gebremariam was producing, propagating or processing marijuana.

Therefore, when viewing the evidence in the light most favorable to the State, with all reasonable inferences drawn in favor of the State, there was substantial evidence to support the trial court's conclusion that Gebremariam manufactured marijuana on October 25, 2016. CP 125. There was substantial evidence to support the trial court's finding that Gebremariam knew what he was manufacturing was marijuana. CP 125. The marijuana met the legal definition. CP 125. Therefore, this Court should affirm the trial court's conclusions of law, find in the light most favorable to the State, there was substantial evidence presented to find sufficient evidence of Manufacturing of Marijuana and affirm Gebremariam's conviction.

**E. THE STATE CONCEDES THE TRIAL COURT'S INQUIRY OF GEBREMARIEM'S ABILITY TO PAY HIS DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS WAS INSUFFICIENT.**

Gebremariam argues the trial court failed to fully engage in an individualized inquiry regarding Gebremariam's ability to make payments on his legal financial obligations before imposing costs and fees. Brief of Appellant 22-24. The trial court's consideration was not satisfactory, it did not ask Gebremariam's job history, assets, or debts. See RP 207. The correct remedy is to remand this case back to the trial court for the judge to conduct the required inquiry.

### **1. Standard Of Review.**

The determination to impose legal financial obligations by a trial court is reviewed by this Court under an abuse of discretion standard. *State v. Clark*, 191 Wn. App. 369, 372, 362 P.3d 309 (2015) (internal citation omitted). “A trial court abuses its discretion only when its decision is manifestly unreasonable or is based on untenable reasons or grounds.” *C.J.*, 148 Wn.2d at 686, 63 P.3d 765 (2003), *citing State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

### **2. The Trial Court’s Inquiry Was Not Sufficient For An Individualized Determination That Gebremariam Had The Ability To Pay The Discretionary Legal Financial Obligations.**

Gebremariam was ordered to pay \$500 victim penalty assessment; \$200 filing fee; \$100 DNA fee; \$ 100 crime lab fee; and \$1,000 VUCSA fine. CP 94-95. The DNA fee, crime victim assessment, and filing fee are all mandatory fees. *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163 (2016); *State v. Stoddard*, 192 Wn. App. 222, 225, 366 P.3d 474 (2016). The VUCSA fine and crime lab fee are discretionary.

In *State v. Blazina* the Washington State Supreme Court determined the Legislature intended that prior to the trial court imposing discretionary legal financial obligations, there must be an

individualized determination of a defendant's ability to pay. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015). The Supreme Court based its reasoning on its reading of RCW 10.01.160(3), which states,

The court shall not order a defendant to pay costs unless the defendant is or will be able to pay them. In determining the amount and method of payment of costs, the court shall take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.

*Blazina*, 182 Wn.2d at 837-38. Therefore, to comply with *Blazina*, a trial court must engage in an inquiry with a defendant regarding his or her individual financial circumstances. *Id.* The trial court must make an individualized determination about not only the present but future ability of that defendant to pay the requested discretionary legal financial obligations before the trial court imposes them. *Id.*

Here the trial court simply asked if Gebremariam would have the ability to pay, if he worked when he was not in custody. RP 207. There was no inquiry into Gebremariam's work history or ability to secure employment after release. *Id.* The trial court did not meet its obligation prior to imposing the sheriff service fees and attorney's fees. This Court should remand so the proper inquiry may be made.

#### IV. CONCLUSION

Gebremariam knowingly, voluntarily, and intelligently waived his right to an attorney and proceeded pro se. Gebremariam did not properly preserve the issue regarding his access to an interpreter, and Gebremariam fails to show this Court it is a manifest constitutional error, therefore he is precluded from raising it for the first time on appeal. Gebremariam knowingly, voluntarily, and intelligently waived his right to a jury trial. The State presented sufficient evidence to sustain Gebremariam's conviction for Manufacturing Marijuana. The State concedes the trial court's inquiry regarding Gebremariam's ability to pay his legal financial obligations was not sufficient. Therefore, this Court should affirm Gebremariam's conviction but remand the case to the trial court for the proper inquiry regarding his legal financial obligations.

RESPECTFULLY submitted this 21<sup>st</sup> day of November, 2016.

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by: \_\_\_\_\_  
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