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Court of Appeals  
Division II  
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

RONALD CRITCHFIELD,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF  
CLALLAM COUNTY, STATE OF WASHINGTON  
Superior Court No. 17-1-00155-3

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BRIEF OF RESPONDENT

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MARK B. NICHOLS  
Prosecuting Attorney

JESSE ESPINOZA  
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11  
Port Angeles, WA 98362-301

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether the court's statement, "I was expecting an objection that we're all afraid to touch it but I guess it's admitted," was not a comment on the evidence because the statement did not convey or imply that the court believed the State's evidence?
2. Whether the record affirmatively establishes that no prejudice could have resulted from the statement such that reversal is not warranted?
3. Whether the record shows that potential prejudice from the court's statement that it expected an objection to the admission of Exhibit no. 1 was precluded by overwhelming evidence of the guilt?

## **II. STATEMENT OF THE CASE**

On April 24, 2017, the State filed an information charging Critchfield with Possession of a Controlled Substance, Methamphetamine. CP 47.

### Trial testimony

On April 22, Timothy Fry received a phone call from a neighbor that something odd was going on outside. RP 57. Fry told his wife to call 911 and then went outside to have a look. RP 57. Fry testified that he saw Critchfield with a bunch of tools trying to disassemble the battery on Fry's trailer. RP 58. Fry confronted Critchfield and Critchfield told Fry he was just relieving himself. RP 58. A neighbor came over to assist Fry and they convinced Critchfield to stay until the police arrived. RP 59. Critchfield was lying on his

stomach on the ground when the police showed up. RP 59. Fry observed a baggie on the ground that was underneath Critchfield as the officers picked Critchfield up from the ground. RP 59.

Corporal Bruce Fernie and Officer Zachary Moore, Port Angeles Police Dept., testified that on April 22, 2017, they responded to a 911 call reporting a theft in progress at Timothy Fry's residence in Port Angeles. RP 64, 91. When the officers arrived, Fernie saw two men standing over Critchfield, holding him down on the ground. RP 92. Critchfield, lying face down on his stomach, looked over towards Fernie and Moore as they were getting out of the patrol vehicle and then reached into his right front pocket frantically as if trying to get something out. RP 92. Critchfield ignored orders to get his hand out of his pocket as the officers approached. RP 65, 92. Critchfield finally removed his clenched hand from his pocket and stuck it under his chest. RP 65, 93. The officers ordered him to get his hands out and then Critchfield stuck his hands out and said, "My hands are out." RP 93.

The officers placed Critchfield in wrist restraints and as they helped him to sit up and Fernie noticed a baggy on the ground where Critchfield was laying. RP 66, 93-94. Officer Moore picked it up and showed it to Fernie. RP 66, 94. Fernie identified the substance in the baggie as methamphetamine based on his past experience. RP 94. Fernie field tested the substance and it came back positive for methamphetamine. RP 94. Critchfield denied that the

baggie was his and said he didn't know anything about it. RP 95. When Officer Moore asked him why he was fishing around in his pockets, Critchfield stated he was trying to remove his meth pipe. RP 75.

At trial, the State requested Cpl. Fernie and Daniel Van Wyk, Washington State Patrol Forensic Scientist, to put on latex gloves before examining the contents of the envelop marked State's Exhibit no. 1. RP 96, 108-109. Cpl. Fernie and Officer Moore identified State's Exhibit no. 1 as the baggie which was recovered from under Critchfield and which was depicted in the photograph marked State's Exhibit no. 4. RP 70-73, 93-96. Fernie believed the baggie contained methamphetamine based his experience. RP 94. Fernie also field tested the substance and it tested presumably positive for methamphetamine. RP 94.

Daniel Van Wyk, testified that he worked as a forensic scientist for the Washington State Patrol crime Laboratory for 12 years and had undergone extensive education and training related to testing controlled substances. RP 106-07. Van Wyk had been qualified to testify as an expert in Forensic Chemistry more than 90 times throughout Washington State. RP 107-08. Van Wyk's lab test of the contents of the baggie marked as State's Exhibit no. 1 resulted in a positive identification for methamphetamine. RP, 111.

The State moved to admit Exhibit no. 1:

MR. ESPINOZA: And finally, Your Honor, the State moves to admit

Exhibit No. 1.

THE COURT: All right, any objection to Exhibit No. 1?

MS. WEIR: I don't believe so but just a moment, Your Honor, while I review my notes. No objection, Your Honor.

THE COURT: All right, I was expecting an objection that we're all afraid to touch it but I guess it's admitted.

RP 113.

Critchfield testified that he made a bad decision to steal the trailer battery and he was caught. RP 121-22. He also testified that he did not see the baggie of methamphetamine and denied that the baggie containing it was his. RP 124. More specifically, he told the officers that he didn't know anything about the baggie. RP 128. Critchfield explained that he was digging in his pocket to try to get rid of his a meth pipe. RP 125, 126. He admitted that he was not successful in getting rid of the pipe and stated, "Actually I told on myself." RP 125.

The jury found Critchfield guilty of Possession of a Controlled Substance, Methamphetamine and Attempted Theft in the Third Degree. RP 167.

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### III. ARGUMENT

#### A. THE TRIAL COURT'S STATEMENT WAS NOT A COMMENT ON THE EVIDENCE BECAUSE IT DID NOT CONVEY THAT THE JUDGE BELIEVED THE STATE'S EVIDENCE.

“Article 4, section 16 of the Washington State Constitution prohibits a trial court from commenting on the evidence.” *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990). “The purpose of this provision is to prevent a jury from being influenced by knowledge conveyed to it by the trial judge as to the trial judge's opinion of the evidence submitted.” *Id.* (citing *State v. Jacobsen*, 78 Wn.2d 491, 495, 477 P.2d 1 (1970)).

“We review allegations of constitutional violations de novo.” *State v. Siers*, 174 Wn.2d 269, 273–74, 274 P.3d 358 (2012). The Court reviews the facts and circumstances of each case when determining whether a trial judge's conduct constituted a comment on the evidence. *State v. Francisco*, 148 Wn. App. 168, 179, 199 P.3d 478, *review denied*, 166 Wn.2d 1027 (2009).

“An impermissible comment is one which conveys to the jury a judge's personal attitudes toward the merits of the case or allows the jury to infer from what the judge said or did not say that the judge personally believed the testimony in question.” *State v. Swan*, 114 Wn.2d 613, 657, 790 P.2d 610 (1990) (citing *Hamilton v. Department of Labor & Indus.*, 111 Wn.2d 569, 571, 761 P.2d 618 (1988); *State v. Ciskie*, 110 Wn.2d 263, 283,

751 P.2d 1165 (1988)).

“The touchstone of error in a trial court's comment on the evidence is whether the feeling of the trial court as to the truth value of the testimony of a witness has been communicated to the jury.” *State v. Francisco*, 148 Wn. App. 168, 179, 199 P.3d 478 (2009) (citing *State v. Lane*, 125 Wn.2d 825, 838, 889 P.2d 929 (1995)).

““To constitute a comment on the evidence, however, it must appear that the attitude of the court toward the merits of the cause must be reasonably inferable from the nature or manner of the questions asked and things said.”” *State v. Brown*, 31 Wn.2d 475, 486 197 P.2d 590 (1948) (quoting *Dennis v. McArthur*, 23 Wn.2d 33, 38, 158 P.2d 644, 647 (1945) *overruled on other grounds in State v. Davis*, 41 Wn.2d 535, 537 (1953) (holding trial objection to an alleged comment on the evidence is not required in order to raise the issue on appeal and that prior opinions to the contrary should be disregarded as dictum)).

Here, the trial judge made the following statement after the State moved for the admission of Exhibit no. 1 into evidence:

All right, I was expecting an objection that we're all afraid to touch it but I guess it's admitted.

RP 113.

The trial judge's statement that it was expecting an objection to the

admission of Exhibit no. 1 on the basis that everyone seemed to be afraid of Exhibit no. 1 was not an expression of the judge's personal belief in the truth of the testimony or evidence. The court did not offer its own opinion as to the identification of Exhibit no. 1 or the weight or credibility regarding anyone's testimony regarding the identification of Exhibit no. 1.

Rather, the court stated that it was expecting an objection and provided a basis for one. Thus, rather than suggesting that the testimony regarding Exhibit no. 1 was true, the judge suggested, although inadvertently, that the admission of the evidence was objectionable by stating that it expected the objection.

Therefore, the court's statement was not an impermissible comment on the evidence and the conviction should be affirmed.

**B. THE RECORD AFFIRMATIVELY SHOWS THAT THE COURT'S STATEMENT PRIOR TO ADMISSION OF EXHIBIT NO. 1 WAS NOT PREJUDICIAL.**

"Washington courts apply a two-step analysis when deciding whether reversal is required as a result of an impermissible judicial comment on the evidence in violation of article IV, section 16. Judicial comments are 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." *State v. Levy*, 156 Wn.2d 709, 723, 132 P.3d

1076 (2006) (citations omitted).

“The presumption of prejudice test has consistently been applied to oral comments made by a judge during the course of a trial.” *Levy*, at 724 (citing *State v. Bogner*, 62 Wn.2d 247, 252, 382 P.2d 254 (1963); *Lampshire*, at 892.

“Jurors are presumed to follow the court's instructions . . . .” *State v. Kalebaugh*, 183 Wn.2d 578, 586, 355 P.3d 253 (2015) (*State v. Grisby*, 97 Wn.2d 493, 499, 647 P.2d 6 (1982)). A court’s instructions admonishing the jury to ignore its comments may cure potential prejudice from an improper comment. *See State v. Elmore*, 139 Wn.2d 250, 276, 985 P.2d 289 (1999); *but see Lampshire*, at 892 (“*Under the facts here*, the damage was done when the remark was made and it was not capable of being cured by a subsequent instruction to disregard.” (emphasis added)).

Here, the court instructed the jury to disregard its own comments in

Jury Instruction no. 1:

Our state constitution prohibits a trial judge from making a comment on the evidence. It would be improper for me to express, by words or conduct, my personal opinion about the value of testimony or other evidence. I have not intentionally done this. If it appeared to you that I have indicated my personal opinion in any way, either during trial or in giving these instructions, you must disregard this entirely.

CP 27–28.

Instruction no. 1 above rebuts the presumption of prejudice due to any

improper effect the court's statement may have had on the jury because juries are presumed to follow the court's instructions. *Kalebaugh*, at 586. Furthermore, Critchfield has presented nothing in the record to support his argument prejudice except speculation that the jury may have misinterpreted the statement in a prejudicial manner because Critchfield never admitted to the elements of the crime. *See Elmore*, at 276; *see* Br. of Appellant at 8. There is no evidence in the record showing that the jury interpreted the trial judges's statement to mean that the trial judge believed the testimony of the witnesses identifying Exhibit no. 1 as methamphetamine.

Additionally, the trial judge did not express whether he feared the contents of Exhibit no. 1. There was no reason to as the judge did not ever touch the exhibit. Although the statement might have drawn attention to the fact that the witnesses wore gloves when handling the exhibit, the statement showed that the court anticipated that the defense might find that to be objectionable.

The statement practically invited objection to the admission of Exhibit no. 1:

All right, I was expecting an objection that we're all afraid to touch it but I guess it's admitted.

RP 113.

Critchfield cites to *Lampshire* in support of the argument that a

curative instruction is not determinative as to whether any resulting prejudice was cured. *See Lampshire*, at 892; Br. of Appellant, at 7. *Lampshire* is distinguishable from the instant case.

In *Lampshire*, the trial judge offered his personal opinion on the materiality of the Lampshire's testimony: "[A]fter an objection to the materiality of the testimony by the prosecution, the judge stated, in the presence of the jury: Counsel's objection is well taken. We have been from bowel obstruction to sister Betsy, and *I don't see the materiality*, counsel." *Lampshire*, at 891.

Thus, the court's statement in *Lampshire* could have clouded the jury's perception of the defendant's entire testimony. The *Lampshire* Court explained that "the record affirmatively shows that the court's comment was prejudicial, since it undermined the credibility of the defendant's testimony, and *there is an absence of any showing to the contrary*" and, therefore, held "that prejudicial error has been committed." *Lampshire*, at 892.

*Lampshire* does not help Critchfield's argument in this case because it ignores the fact that the *Lampshire* Court, rather than simply presuming prejudice, actually found prejudice from the record. *Lampshire*, at 892. The *Lampshire* Court also pointed out that there was no evidence in the record to the contrary. *Id.*

Here, rather than evidence of prejudice from the record, it is only

alleged on the basis that Critchfield never admitted anything in regards to the baggie of methamphetamine. Appellant Br. at 8. However, Critchfield did not dispute whether or not the substance was methamphetamine. Rather, Critchfield testified that he had no knowledge of the baggie or its contents at all. RP 124. Additionally, Critchfield admitted to the theft which put his credibility more at issue and he also admitted to trying to get a meth pipe out of his pocket.

Therefore, unlike *Lampshire*, assuming the statement was a comment on the evidence, there is only a presumption of prejudice and because juries are presumed to follow instructions, the presumption of prejudice is overcome.

Furthermore, *Lampshire* is distinguishable from this case because *Lampshire* Court specifically limited its conclusion to the facts and circumstances of that case. See *Lampshire*, at 892 (“*Under the facts here*, the damage was done when the remark was made and it was not capable of being cured by a subsequent instruction to disregard.” (emphasis added)); see also *Francisco*, at 179.

In the instant case, unlike in *Lampshire*, the court did not comment on the materiality of anyone’s testimony, let alone Critchfield’s. Moreover, the record demonstrates that prejudice in the instant case would have been *precluded* by the overwhelming evidence already presented to the jury

regarding Exhibit no. 1.

Therefore, the record clearly shows that no prejudice could have resulted from the trial court's statement and the Court should affirm the conviction.

**C. POTENTIAL PREJUDICE FROM THE  
COURTS'S STATEMENT WAS PRECLUDED  
BY OVERWHELMING EVIDENCE OF GUILT.**

The court's statement was that it had expected a defense objection to the admission to Exhibit no. 1 on the basis of that everyone was afraid to touch it was presumably due to the use of latex gloves.

All right, I was expecting an objection that we're all afraid to touch it but I guess it's admitted.

RP 113.

This statement could only be a comment on the evidence if an unreasonably misinterpreted. The statement is more likely to convey to the jury that the witnesses handling of the evidence with latex gloves was an expression of fear by *the witnesses* that testified in regards to Exhibit no. 1 and was objectionable. The defendant was certainly not prejudiced by the court's expectation of such an objection. The statement was more likely to imply that the court found the handling of the exhibit to be objectionable because the use of latex gloves could convey fear of the item to the jury. The statement could imply to the jury that the court was inviting the defense to

object. This in turn could cast doubt toward the presentation of the State's case. The defendant was not prejudiced.

The court's statement invited an objection to the admission of the methamphetamine in evidence or expressed a basis for one. This makes it a stretch to assume that the jury misinterpreted the statement to mean that the court believed the substance to be methamphetamine. If that is what the court believed, then why would the court suggest to the defense an objection to the admission of the evidence? The testimony at trial makes this assumption highly unlikely.

However, for argument's sake, if the statement is deemed to be a comment on the evidence, then the presumption of prejudice is overcome due to the overwhelming untainted evidence of guilt.

A presumption of prejudice can be overcome where "the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." See *State v. Lane*, 125 Wn.2d 825, 839, 889 P.2d 929 (1995) (quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986)) (finding State's burden of proving the judge's comments could not have influenced the jury satisfied by application of the overwhelming untainted evidence test).

Here, the jury already heard what Exhibit no. 1 was alleged to be in opening arguments and testimony. The testimony showed the defendant was

trying to hide the baggie from the officers and managed to hide the baggie of methamphetamine under his chest while lying down. The officers saw the baggie as he got up and both suspected the item to be methamphetamine based on their experience. The substance field tested positive for methamphetamine. Critchfield denied knowing anything about the baggie saying that he was just trying to get his meth pipe out of his pocket.

Finally, the item was tested by an experienced forensic scientist and was identified as methamphetamine. There was no evidence to the contrary that the item was not methamphetamine. It was not a disputed issue. The jury heard all of this evidence prior to the court's statement, rendering the statement even more innocuous.

Thus, the evidence that the substance at issue was methamphetamine was overwhelming and the jury did not need the court's help for it to be apparent that the witnesses should take precautionary measures when handling it. Although the court's statement implying that these precautions might be objectionable might be baffling to the jury, it was still left still to the jury to decide whether substance was a controlled substance or not.

The court, without expressing its own opinion on the subject, simply pointed out what everyone already saw and that it anticipated that the defense might find it objectionable. This was not a statement of the court's opinion of the evidence and any potential prejudice was overcome by overwhelming

untainted evidence of guilt.

Therefore, this Court should affirm the conviction.

#### IV. CONCLUSION

The trial court's statement regarding the admission of Exhibit no. 1 was a statement of what the court expected might be the basis for an objection. The statement did not convey that the judge believed the state's evidence. Therefore, the statement was not a comment on the evidence.

The identity of Exhibit no. 1 was not disputed and there was no evidence of prejudice, therefore, the record affirmatively shows there was no prejudice from the statement at issue and any presumption of prejudice was cured by the court's curative instructions.

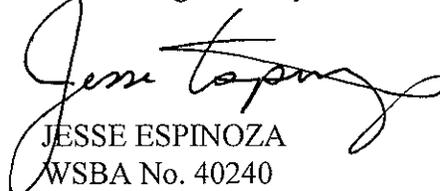
Finally, any prejudice was precluded by the overwhelming undisputed evidence already before the jury regarding the identity of Exhibit no. 1.

For the foregoing reasons, the Court should affirm the conviction.

Respectfully submitted this 13th day of February, 2018.

Respectfully submitted,

MARK B. NICHOLS  
Prosecuting Attorney

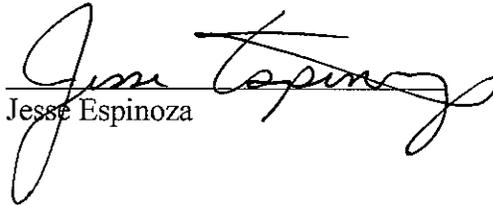


JESSE ESPINOZA  
WSBA No. 40240  
Deputy Prosecuting Attorney

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Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to David B. Koch on February 13, 2018.

MARK B. NICHOLS, Prosecutor

  
Jesse Espinoza

**CLALLAM COUNTY DEPUTY PROSECUTING ATTORN**

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