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Division II
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No. 51705-1-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

EARNEST ROTH,

Appellant.

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 the State present sufficient evidence to sustain the jury's verdict for Possession of a Controlled Substance, to-wit: over 40 grams of marijuana?

B. Did the deputy prosecutor commit prosecutorial error by misstating the law regarding constructive possession during his closing argument?

C. Did the trial court error by admitting irrelevant evidence?

D. Did Roth receive effective assistance from his trial counsel?

E. Did the trial court improperly impose discretionary legal financial obligations on an indigent defendant due to the retroactivity of the 2018 legislative amendments to the legal financial obligations statutes?

II. STATEMENT OF THE CASE

On September 11, 2017, Detective Schlecht traveled to Pe Ell regarding a complaint about marijuana plants growing outside a residence located at 520 North Main Street. RP 37.[1] Detective Schlecht works for the Lewis County Sheriff's Office assigned to the Joint Narcotics Enforcement Team. RP 35. Detective Schlecht arrived at the residence and observed a fifth-wheel trailer hooked up to a semi truck. RP 38. Out in the open in front of the fifth-wheel located off to one side, were two, very large, marijuana plants. RP

[1] The State will refer to the continually paginated verbatim report of proceedings, 3/12/18 through 3/20/18 as RP. Any other citations to verbatim reports of proceedings will contain the date of the proceedings.

38; Ex 6.[2] The marijuana plants were approximately eight to nine feet away from the trailer. RP 82.

Roth and his wife, Amy,[3] reside at 520 North Main Street. RP 79, 81, 88, 93; Ex. 4. Roth and Amy have been married almost two years. RP 85. Roth lives in Salem part time and Pe Ell part time. RP 88, 93.

While he was still at 520 North Main Street, Detective Schlecht was able to obtain a phone number for Roth. RP 79. Detective Schlecht spoke to Roth and asked him about the marijuana that was growing at the residence. RP 81. Roth indicated he knew about the marijuana growing out front of his trailer. RP 81. Roth told Detective Schlecht, Amy wanted to see if they could grow marijuana with her rose bushes. RP 81.Roth explained they planted some seeds and they grew. RP 81. Roth told Detective Schlecht they used to have medical authorization for marijuana in Washington State. RP 82. Roth did not mention anyone else having authorization to grow the marijuana. RP 82.

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[2] The State will be submitting a supplemental designation of Clerk's papers to include Exhibit 6, the photograph of the marijuana plants in their pots outside of Roth's residence.
[3] The State will refer to Amy Roth by her first name to avoid confusion, no disrespect intended.

The State charged Roth with Possession of a Controlled Substance, to-wit: over 40 grams of Marijuana. CP 1-2. The State dismissed Roth's case prior to the venire being seated the first day of jury trial due to lack of evidence to establish Roth's residence. RP (1/29/18) 15-16. The State refiled its charge and the case proceeded to trial quickly due to the lack of speedy trial time. RP 6-7, 26; CP 1-2.

Roth elected to have his case tried to a jury. *See* RP. The State presented its evidence, as outlined in the facts above. Roth had a number of witnesses testify on his behalf. RP 85-97. Amy explained the marijuana plants belonged to her and she alone cared for them and smoked marijuana. RP 87-88. Randolph Verburg, a friend of the Roth's, testified he knows only Amy to smoke marijuana. RP 92. Shane Langehennig also testified he has only known Amy to use marijuana, not Roth. RP 95. Mr. Langehennig stated the marijuana plants belonged to Amy. RP 96. Roth testified on his own behalf, stating he has not used marijuana since the '70s. RP 100. Roth explained he is an Oregon resident and works for the DOJ. RP 99. Roth stated the marijuana plants belonged to Amy. *Id.*

Ultimately, the jury convicted Roth as charged. CP 33. The trial court sentenced Roth to five days in jail, which it allowed to be

served on electronic home monitoring. CP 48-51. Roth was ordered to pay legal financial obligations, including attorney fees, a crime lab fee, filing fee, and a DNA collection fee. CP 52. Roth timely appeals his conviction and sentence. CP 47-57.

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

III. ARGUMENT

A. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUSTAIN THE JURY'S VERDICT THAT ROTH COMMITTED POSSESSION OF A CONTROLLED SUBSTANCE, TO-WIT: OVER 40 GRAMS OF MARIJUANA.

There was sufficient evidence presented to show beyond a reasonable doubt that Roth committed the crime of Possession of a Controlled Substance, to-wit: over 40 grams of Marijuana. Contrary to Roth's assertion, the facts taken in the light most favorable to the State sustain all of the essential elements of the charged offenses. The Court should sustain the jury's verdict.

1. Standard Of Review.

Sufficiency of evidence is reviewed in the light most favorable to the State to determine if any rational jury could have found all the essential elements of the crime charged beyond a reasonable doubt. *State v. Salinas,* 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

2. The State Proved, As It Is Required To, Each Element Of Possession Of A Controlled Substance, To Wit: Over 40 Grams Of Marijuana.

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).

The role of the reviewing court does not include substituting its judgment for the jury's by reweighing the credibility or importance of the evidence. *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). The determination of the credibility of a witness or evidence is solely within the scope of the jury and not subject to review. *State v. Myers,* 133 Wn.2d 26, 38, 941 P.2d 1102 (1997), *citing State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). "The fact

finder…is in the best position to evaluate conflicting evidence, witness credibility, and the weight to be assigned to the evidence." *State v. Olinger*, 130 Wn. App. 22, 26, 121 P.3d 724 (2005) (citations omitted).

To convict Roth of Possession of a Controlled Substance the State was required to prove, beyond a reasonable doubt, that Roth, possessed a controlled substance, to-wit: over 40 grams of marijuana. RCW 69.50.4013; RCW 69.50.402(c)(22); CP 1.

The to-convict jury instruction required the jury to find:

> To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about September 11, 2017, the defendant possessed a controlled substance, to wit: over 40 grams of Marijuana; and
>
> (2) That this act occurred in the State of Washington.
>
> If you find from the evidence that each of these elements has been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty.
>
> On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of these elements, then it will be your duty to return a verdict of not guilty.

CP 27 (Instruction 6), *citing* WPIC 50.02. The jury was instructed how possession may be actual or constructive. CP 28, *citing* WPIC 50.03.

The instruction also discusses how proximity alone without dominion and control is insufficient to establish constructive possession and considerations for dominion and control. *Id.*

Possession of a controlled substance may be actual or constructive. *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). A person is in actual possession when a controlled substance is in the personal custody of the person. *Callahan*, 77 Wn.2d at 29. When a person does not have actual possession but has dominion or control over the controlled substance or the premises, the person is in constructive possession of the controlled substance. *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004) (citation omitted). A person is not required to have exclusive control for the State to establish constructive possession. *Cote*, 123 Wn. App. at 549. A person who is in mere proximity of a controlled substance, without more, is not in constructive possession of the controlled substance. *Id.*

Determinations regarding dominion and control are made looking at the totality of the circumstances. *State v. Davis*, 182 Wn.2d 222, 234, 340 P.3d 820 (2014), *citing State v. Partin,* 88 Wn.2d 899, 906 567 P.2d 1136 (1977). The ability to take actual possession of the controlled substance and exclude others from possession can be

considered when determining whether a person had dominion and control over a controlled substance. *Davis*, 182 Wn.2d at 234; WPIC 50.03. “Factors supporting dominion and control include ownership of the item and, in some circumstances, ownership of the premises. But, having dominion and control over the premises containing the item does not, by itself, prove constructive possession.” *Id.* Dominion and control does raise a rebuttable inference over the contraband found within the premises. *State v. Tadeo-Mares*, 86 Wn. App. 813, 816, 939 P.2d 220 (1997).

Roth resided, at least part time, at 520 North Main Street, in Pe Ell, with his wife Amy. RP 88; Ex. 4. Amy testified she lived with Roth at the residence but they also had a place in Salem because they were in the process of moving up to Pe Ell. RP 88. Randolph Verburg referred to Roth moving to town (Pe Ell) and acknowledged going over to Roth’s trailer. RP 91-92. Roth also filled out a Pe Ell witness statement listing his address as 520 S Main Street # C. Ex. 4. Reserve Deputy Rivers explained it was inaccurate because the address was actually North Main Street, not South Main Street. RP 78. Reserve Deputy Rivers explained he previously had multiple contacts with Roth at 520 North Main Street. RP 79.

The marijuana, which there is no dispute from Roth is over 40 grams, was located within feet of his trailer in an area containing items belonging to Roth. RP 55-56, 82, 101; Ex. 6. According to Detective Schlecht, when asked about the marijuana plants, Roth stated he believed it was legal to grow it out in the open if he was not selling drugs. RP 104. Roth also told Detective Schlecht they used to have a medical authorization to grow marijuana in Washington. RP 82. Roth said his wife wanted to see if they could grow marijuana so they planted some seeds. RP 81.

Roth had dominion and control of the premises, as it was his residence, even if Roth only lived there part of the time. Roth admitted the trailer belonged to him and his wife. RP 100. Roth used the address and filled out a witness statement indicating it was his trailer. Ex. 4. While dominion and control of the premises does not equate to possession of all objects in or at the premises, it does raise a rebuttal inference of dominion and control over those objects. *Tadeo-Mares,* 86 Wn. App. at 816. Both Roth and Amy can have control of the marijuana, as dominion and control need not be exclusive for the State to prove constructive possession. *Cote,* 123 Wn. App. at 549.

The crime charged by the State was possession of marijuana not use of marijuana. The fact there was testimony by witnesses that Roth did not use or consume marijuana is not particularly relevant to whether he possessed the growing plants in front of his trailer. Roth's statements to Detective Schlecht are further proof Roth possessed the marijuana. RP 81-82. While Roth testified at trial he did not make those statements to Detective Schlecht, the fact finder resolves conflicting testimony and determines witness credibility, and the jury obviously did not find Roth's testimony credible. *Olinger*, 130 Wn. App. at 26.

The totality of the circumstances establish Roth was in constructive possession of marijuana plants. In the light most favorable to the State, with all reasonable inferences drawn in favor of the State, there was sufficient evidence presented for a reasonable jury to find Roth guilty of Possession of a Controlled Substance, to-wit: over 40 grams of Marijuana, beyond a reasonable doubt. This Court should affirm Roth's conviction.

B. THE DEPUTY PROSECUTOR DID NOT COMMIT PROSECUTORIAL ERROR DURING CLOSING ARGUMENT BY MISSTATING THE LAW REGARDING CONSTRUCTIVE POSSESSION.

Roth claims the deputy prosecutor committed prosecutorial error (misconduct)[4] by misstating the law regarding constructive possession. Brief of Appellant 10-13. Roth mischaracterizes the deputy prosecutor's argument and does not consider the full context of what the deputy prosecutor argues. The deputy prosecutor's characterization of constructive possession is accurate, he does not misstate the law, and argues inferences from the evidence that is permissible.

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[4] "'Prosecutorial misconduct' is a term of art but is really a misnomer when applied to mistakes made by the prosecutor during trial." *State v. Fisher*, 165 Wn.2d 727, 740 n. 1, 202 P.3d 937 (2009). Recognizing that words pregnant with meaning carry repercussions beyond the pale of the case at hand and can undermine the public's confidence in the criminal justice system, both the National District Attorneys Association (NDAA) and the American Bar Association's Criminal Justice Section (ABA) urge courts to limit the use of the phrase "prosecutorial misconduct" for intentional acts, rather than mere trial error. *See* American Bar Association Resolution 100B (Adopted Aug. 9-10, 2010), http://www.americanbar.org/content/dam/aba/migrated/leadership/2010/annual/pdfs/100b.authcheckdam.pdf (last visited Aug. 29, 2014); National District Attorneys Association, Resolution Urging Courts to Use "Error" Instead of "Prosecutorial Misconduct" (Approved April 10 2010), http://www.ndaa.org/pdf/prosecutorial_misconduct_final.pdf (last visited Aug. 29, 2014). A number of appellate courts agree the term "prosecutorial misconduct" is an unfair phrase that should be retired. *See, e.g., State v. Fauci*, 282 Conn. 23, 917 A.2d 978, 982 n. 2 (2007)*; State v. Leutschaft*, 759 N.W.2d 414, 418 (Minn. App. 2009), *review denied*, 2009 Minn. LEXIS 196 (Minn., Mar. 17, 2009); *Commonwealth v. Tedford*, 598 Pa. 639, 960 A.2d 1, 28-29 (Pa. 2008). In responding to appellant's arguments, the State will use the phrase "prosecutorial error." The State will be using this phrase and urges this Court to use the same phrase in its opinions.

1. Standard Of Review.

The standard for review of claims of prosecutorial error is abuse of discretion. *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. The Deputy Prosecutor's Statements During Closing Arguments Are Permissible, As The Argument Does Not Misstate The Law and Is Made From Reasonable Inferences From The Evidence Admitted.

A claim of prosecutorial error is waived if trial counsel failed to object and a curative instruction would have eliminated the prejudice. *State v. Belgrade,* 110 Wn.2d 504, 507, 755 P.2d 174 (1988). "[F]ailure to object to an improper remark constitutes a waiver of error unless the remark is so flagrant and ill intentioned that it causes an enduring and resulting prejudice that could not have been neutralized by admonition to the jury." *State v. Thorgerson,* 152 Wn.2d 438, 443, 258 P.3d 43 (2011), *citing State v. Russell*, 125 Wn.2d 24, 86, 882 P.2d 747 (1994) (additional citations omitted). Roth did not object to any of his now alleged prosecutorial error. *See* RP 360-67.

To prove prosecutorial error, it is the defendant's burden to show the deputy prosecutor's conduct was both improper and prejudicial in the context of the entire record and the circumstances

at trial. *State v. Gregory*, 158 Wn.2d 759, 809, 147 P.3d 1201 (2006), *citing State v. Kwan Fai Mak,* 105 Wn.2d 692, 726, 718 P.2d 407 (1986); *State v. Hughes*, 118 Wn. App. 713, 727, 77 P.3d 681 (2003). In regards to a prosecutor's conduct, full trial context includes, "the evidence presented, 'the context of the total argument, the issues in the case, the evidence addressed in the argument, and the instructions given to the jury.'" *State v. Monday*, 171 Wn.2d 667, 675, 257 P.3d 551 (2011), *citing State v. McKenzie,* 157 Wn.2d 44, 52, 134 P.3d 221 (2006) (other internal citations omitted). A comment is prejudicial when "there is a substantial likelihood the misconduct affected the jury's verdict." *State v. Brown,* 132 Wn.2d 529, 561, 940 P.2d 546 (1997), *cert. denied,* 523 U.S. 1007(1998).

"[A] prosecutor has wide latitude in closing argument to draw reasonable inferences from the evidence and may freely comment on witness credibility based on the evidence." *State v. Lewis,* 156 Wn. App. 230, 240, 233 P.3d 891 (2010), *citing Gregory*, 158 Wn.2d at 860. That wide latitude is especially true when the prosecutor, in rebuttal, is addressing an issue raised by a defendant's attorney in closing argument. *Id.* (citation omitted).

Roth argues during the deputy prosecutor's closing argument he committed prosecutorial error by arguing to the jury that Roth's

admission to having dominion and control over the premises established Roth's guilt. Brief of Appellant 11. Roth further asserts the deputy prosecutor misstated the law regarding constructive possession, thereby committing error by misinforming the jury Roth could be found guilty of possession of a controlled substance simply because he had possession of the property where the plants were located. *Id.* at 12. Roth fails to consider the deputy prosecutor's closing argument in its full context, instead cherry picking a couple statements and asserting those statements misstate the law. This is simply not the case and the deputy prosecutor did not commit error.

The deputy prosecutor argues in his closing argument Roth did not have actual possession of the marijuana plants, but did have constructive possession of the plants. RP 134-35. The deputy prosecutor gives an example to the jury of what constructive possession would be:

> Constructive possession would be if I lay that pen there, if someone comes up and tries to take it, I have the ability to say, hey, that's my pen or the pen is currently on my pad of paper, I have the ability to grab the pen and take it away from them and I have control over where the pen is to a certain extent because it's on my pad.

RP 134.

The deputy prosecutor next points out to the jury the marijuana was located approximately eight feet from Roth's trailer, in two pots. *Id.* The deputy prosecutor calls the jury's attention to Exhibit 6, the photograph of the two marijuana plants and noted their size. *Id.* The deputy prosecutor notes numerous items in the photograph, such as the pots, tent, and the bicycle. *Id.* The deputy prosecutor discusses how Roth said he would be upset if the deputy went up to one of the pots and hit it. RP 134-35. The deputy prosecutor states:

> Well, that's because he has control over the pot. That's his trailer, he testified it was his trailer in the background, and these are his items. So he has dominion and control over the area where the marijuana is located. And we know that because he has all of his other stuff around there.

RP 135.

The deputy prosecutor next discusses how the area around the marijuana plants was a self-contained area. RP 135. The items found in the self-contained area around Roth's trailer were Roth's belongings. *Id.*

> But there was groupings of material that belonged to the defendant around his trailer and then, you know, there's a space, and then somebody else's stuff. So this stuff was clearly associated with Mr. Roth. He testified on the stand that he had control over the area where the marijuana was located. So he constructively possessed the marijuana.

RP 135.

The deputy prosecutor does not misstate the law on constructive possession. The deputy prosecutor is arguing the totality of the circumstances shows Roth had dominion and control of the premises. This totality of the circumstances gives rise to a rebuttable inference of dominion and control over the possessions found on the premises. The deputy prosecutor throughout the argument ties together the items found on the premises to Roth, the tent, the trailer, how Roth had access, and how Roth could exert control over the items. This is proper argument for constructive possession, as outlined in the argument above. *See*, *Davis,* 182 Wn.2d at 234; *Cote,* 123 Wn. App at 549; *Tadeo-Mares*, 86 Wn. App. at 816; WPIC 50.03.

The deputy prosecutor is allowed to argue the facts, apply the applicable law as given to the jury, which in this case would be instruction seven, and argue inferences from the facts. The deputy prosecutor did exactly this in the argument above.

The jury was instructed that proximity alone, without proof of dominion and control was not sufficient to establish constructive possession. RP 130, 156; CP 28, *citing* WPIC 50.03. The deputy prosecutor draws the jury's attention to this part of the instruction during his rebuttal. RP 156. The deputy prosecutor again explains

why Roth, under the totality of the circumstances, had dominion and control over the area where the marijuana was located, thereby, the rebuttable inference in this case, had constructive possession of the marijuana. RP 156. This is permissible argument, within the confines of the law, and this Court should hold the deputy prosecutor did not commit prosecutorial error. This Court should affirm Roth's conviction.

C. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT ADMITTED EXHIBIT FOUR, ROTH'S PRIOR WITNESSES STATEMENT TO POLICE, WITHOUT REDACTIONS.

The trial court did not abuse its discretion when it admitted relevant evidence, Exhibit 4, over Roth's objection. Roth argues unredacted Exhibit 4 was not relevant evidence, therefore the trial court committed prejudicial error by refusing to redact the statement to exclude the narrative portion. Brief of Appellant 13-15. Roth's argument fails and this Court should affirm the trial court's ruling and Roth's conviction.

1. Standard Of Review.

Admissibility of evidence determinations by the trial court are reviewed under an abuse of discretion standard. *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999) (citations omitted). 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). A trial court's conclusions of law are reviewed de novo. *State v. Johnson,* 128 Wn.2d 431, 443, 909 P.2d 293 (1996).

If the trial court's evidentiary ruling is erroneous, the reviewing court must determine if the erroneous ruling was prejudicial. *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997). An error is prejudicial if "within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred." *Bourgeois,* 133 Wn.2d at 403 (citations omitted).

2. The Trial Court's Admission Of Exhibit Four Was Not An Abuse Of Its Discretion.

Contrary to Roth's assertion, the State established the relevance of Roth's statement, Exhibit 4. RP 77; Ex. 4. The State is permitted to introduce relevant evidence in an attempt to substantiate the charges against the defendant to secure a conviction. The trial court told Roth's trial counsel he could propose a limiting instruction for any statements contained within the document that may be irrelevant or impermissible. RP 77.

The proponent of evidence must establish its relevance, materiality, and the elements of a required foundation, by a preponderance of the evidence. *State v. Nava*, 177 Wn. App. 272,

290, 311 P.3d 83 (2013) (citations omitted); *State v. Hilton*, 164 Wn. App. 81, 99, 261 P.3d 683 (2011). “Evidence is relevant if it has any tendency to make any fact that is of consequence to the case more or less likely than without the evidence.” *State v. Thomas*, 150 Wn.2d 821, 858, 83 P.3d 970 (2004), *citing* ER 401.

Under ER 403, evidence that is relevant “may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice…or needless presentation of cumulative evidence.” There is a danger of unfair prejudice, in the context of ER 403, “[w]hen evidence is likely to stimulate an emotional response rather than a rational decision[.]” *State v. Powell*, 126 Wn.2d 244, 264 893 P.2d 615 (1995).

The State was attempting to establish Roth lived at 520 North Main Street. RP 77-79; Ex. 4. It was essential to the State’s case to show the jury Roth lived at the trailer. The statement Roth gave Pe Ell police on May 23, 2017, contains not only his handwritten assertion by listing his address as 520 Main Street, but there are statements asserting the trailer as his residence. Ex. 4. The State informed the trial court:

> I guess the admission would be that in the report he refers to it as his residence so it adds to it being his location. There's also his phone number as an offer of proof, that's the phone number that Detective Schlecht

> had and spoke with a person whose voice he recognized as Ernest Roth and the person identified himself as Ernest Roth so the phone number also goes to the weight to be given to the statement.

RP 77.

In the statement, Roth wrote, “I got a phone call from my neibor [sic] (Bob) around 10:30 pm 05-22-17 Monday night. He said Amy was at the trailer with a man and a woman in a blue car and wondered if everything was ok.” Ex. 4. Later in the statement he writes of asking the Pe Ell Town Marshall to go inside the trailer, after discovering the back door lock was broken, and retrieving Roth’s pistol and securing the door. Ex. 4. Roth also references returning back “home” to the trailer at 8:00 am the next morning to do repairs. Ex. 4. These statements are all indicative of ownership, residence, and dominion and control, and therefore relevant.

There are statements about Amy not being allowed to be at the residence, being on DOC, and items missing from trailer. Ex. 4. The trial court also told Roth’s trial counsel, “I'm going to allow it in as its [sic] written. You can propose a limiting instruction if you want. It's clear it's about something else. And most of it is not what it's being offered for. It's being offered for this very limited purpose.” RP 77.

Therefore, the State established the statement was material and the probative value outweighed any possible prejudice. The

State was not allowed to use the statements regarding Amy for impeachment value and, if Roth determined it was to his tactical advantage, he could propose a limiting instruction, which he did not do. RP 108-116; CP 19-32. The statement did not evoke an improper emotional response. The State did not argue Exhibit 4 impeached Amy, or attempt to use Exhibit 4 to impeach Amy in violation of the motions in limine. RP 15-19, 88-90, 133-38, 154-59. The trial court did not abuse its discretion when it admitted Exhibit 4, and this Court should affirm Roth's conviction.

D. ROTH RECEIVED EFFECTIVE ASSISTANCE FROM HIS ATTORNEY THROUGHOUT THE TRIAL PROCEEDINGS.

Roth's attorney provided competent and effective legal counsel throughout the course of his representation. Roth argues his trial counsel was ineffective for failing to object to introduction of Exhibit 4 on the grounds it was inadmissible under ER 403 and ER 404(b). Roth's attorney is not required to make baseless objections to evidence the State seeks to admit. Roth's trial counsel was effective and this Court should affirm his convictions.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered.

State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Roth's Attorney Was Not Ineffective During His Representation Of Roth Throughout The Jury Trial.

To prevail on an ineffective assistance of counsel claim Roth must show (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The Court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688*.* There is a sufficient basis to rebut the presumption an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d

1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Roth argues his trial counsel was ineffective for failing to object to Exhibit 4 pursuant to ER 403 and ER 404(b) because it "includes a statement Mr. Roth had previously had marijuana in his possession." Brief of Appellant 15. Roth argues the prior marijuana possession was an act of prior misconduct and therefore inadmissible and used to show a propensity to commit the crime charged. *Id.* at 16-19. Roth's argument fails on multiple levels.

The statement Roth gave police states, "Whatever money (change) in a drawer was gone some of the marijuana (weed) was gone. All of the jewrey [sic] (Rings)(Neckless) Ect… was gone and most of Amys [sic] clouths [sic] shoes were gone." Ex. 4, page 2. This statement was given on May 22, 2017. Ex. 4. Marijuana became legal to possess in Washington State on May 1, 2013, after the passing of Initiative Measure No. 502. Laws of 2013, ch. 116; Laws of 2013, ch. 3, § 20. Pursuant to new law, it is not illegal for a person 21 years of age or older to possess 40 grams or less of marijuana. RCW 69.50.4013.

A party may not admit evidence of other crimes, wrongs, or acts of a person to show action in conformity therewith. *State v. Yarbrough*, 151 Wn. App. 66, 81, 210 P.3d 1029 (2009). The purpose and scope of ER 404(b) is that it "governs the admissibility of evidence of other crimes or misconduct for purposes other than proof of general character." 5D Karl B. Tegland, Washington Practice: Courtroom Handbook on Washington Evidence, § 404:6, at 164 (2018-2019). Evidence of other crimes, misconduct, or acts is not admissible to demonstrate a defendant's propensity to commit the crime they are currently charged with. ER 404(b); *State v. Powell*, 166 Wn.2d 73, 81, 206 P.3d 321 (2009). Evidence of other crimes, acts, or wrongs by a person may be admissible for purposes such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. ER 404(b).

Roth argues the prior statement regarding marijuana encouraged the jury to do away with logic in favor of simple propensity, resulting in an improper conviction. Brief of Appellant 19. The possible possession of legal marijuana does not fall under ER 404(b). The State did not seek to introduce Exhibit 4 to show Roth had a propensity to possess over 40 grams of marijuana, did not highlight the portion of the statement regarding the missing

marijuana, and Roth's attorney was invited to provide any type of limiting instruction he believed beneficial or necessary. RP 77, 100-02, 133-38, 154-59. Roth's attorney had no reason to object and any objection would not have been sustained. An attorney is not required to make baseless objections. Roth's attorney's performance was not deficient.

If, this Court finds Roth's counsel should have objected pursuant to ER 403 and ER 404(b), it still must find he was prejudiced by his attorney's lack of action. As argued above, the admission of Exhibit 4 is permissible. Therefore, there is no showing Roth's failure to object by an alternative means was prejudicial. Roth's counsel was not deficient, he cannot show he was prejudiced by the deficient performance, and his claim of ineffective assistance of counsel fails. This Court should affirm Roth's convictions.

E. THE RECORD DOES NOT SUPPORT ROTH'S ASSERTION HE IS INDIGENT PER SE, BUT RATHER INDIGENT ONLY FOR OBTAINING COUNSEL, THEREFORE, THE LEGAL FINANCIAL OBLIGATIONS WERE PROPERLY IMPOSED.

Roth asserts, without any documentation to substantiate his claim, he is indigent per se and therefore, the trial court incorrectly imposed the criminal filing fee and court appointed attorney fees. Brief of Appellant 19-20. The record presented throughout the trial would suggest, at best, Roth was indigent pursuant to RCW

10.101.010(3)(d). Therefore, Roth would be subject to paying the $200 filing fee and the $2,100 in court appointed attorney fees.

The 2018 amendments apply to defendants whose appeals were pending — i.e., their cases were not yet final — when the amendment was enacted. *State v. Ramirez*, 191 Wn.2d 732, 747-49, 426 P.3d 714 (2018). Therefore, Roth receives the benefit of the amendments that apply to him, which in Roth's case it appears none apply.

Roth asserts he is indigent because he was indigent for counsel purposes, both at trial and for appeal, and therefore he is entitled to have the above stated discretionary legal financial obligations stricken. Brief of Appellant 19-20. This is simply not true. Per the statutory amendments of 2018, the filing fee is no longer a nondiscretionary legal financial obligation if a defendant qualifies for indigency under RCW 10.101.010(3)(a)-(c). RCW 36.18.020(h). Further, only if a defendant is indigent "per se" under RCW 10.101.010(3)(a)-(c) shall the sentencing court not order a defendant to pay costs. RCW 10.01.160(3).

> (3) "Indigent" means a person who, at any stage of a court proceeding, is:
>
> (a) Receiving one of the following types of public assistance: Temporary assistance for needy families, aged, blind, or disabled assistance benefits, medical

> care services under RCW 74.09.035, pregnant women assistance benefits, poverty-related veterans' benefits, food stamps or food stamp benefits transferred electronically, refugee resettlement benefits, medicaid, or supplemental security income; or
>
> (b) Involuntarily committed to a public mental health facility; or
>
> (c) Receiving an annual income, after taxes, of one hundred twenty-five percent or less of the current federally established poverty level;

RCW 10.101.010(3)(a)-(c). Income is defined as,

> Salary, wages, interest, dividends, and others earnings which are reportable for federal income tax purposes, and cash payments such as reimbursements received from pensions, annuities, social security, and public assistant programs. It includes any contribution received from any family member or other person who is domiciled in the same residence as the defendant and who is heling defray the defendant's basic living costs.

RCW 10.101.010 (2)(b).

There is no evidence in the record Roth meets the criteria of indigence under the per se standard. Simply having court appointed counsel only falls under RCW 10.101.010(3)(d), not the subsection that exempts a defendant from paying the filing fee or paying the cost of his court appointed counsel.

In actuality, the record supports the imposition of the fees on Roth. During the trial Roth stated he worked for the Department of Justice (DOJ). RP 99. During his sentencing hearing Roth informed

the trial court he was a truck driver, hauling pharmaceuticals for Cardinal Health, and his activities were monitored by the DEA. RP 171. Roth then informed the trial court he currently brought home $5,000 a month. RP 173. Roth's employment status is also noted on his electronic home monitoring order. RP 44-46.

Roth is not indigent under the per se definition in RCW 10.101.010(3)(a)-(c). Further, while Roth may meet the definition of indigent pursuant to RCW 10.101.010(d), he clearly is able to pay discretionary legal financial obligations given his profession, his work, and his income at the time of sentencing. This Court should reject Roth's demand to strike the criminal filing fee and the court appointed attorney fees.

IV. CONCLUSION

There was sufficient evidence presented to sustain Roth's conviction for Possession of a Controlled Substance, to-wit: possession of over 40 grams of Marijuana. The deputy prosecutor did not commit prosecutorial error by misstating the law regarding constructive possession during his closing argument. The trial court did not abuse its discretion when it admitted Exhibit 4 into evidence, as it was relevant and not unfairly prejudicial. Roth received effective assistance from his trial counsel. Finally, the record does not support

the presumption Roth is indigent per se, therefore, the legal financial obligations were properly imposed. This Court should affirm Roth's conviction and sentence.

RESPECTFULLY submitted this 25th day of February, 2019.

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by:_____
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LEWIS COUNTY PROSECUTING ATTORNEY'S OFFICE

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