

FILED
Court of Appeals
Division II
State of Washington
2/26/2020 4:10 PM

COA No. 53171-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

BRANDON RYAN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF PIERCE COUNTY

The Honorable KITTY-ANN van DOORNINCK

REPLY BRIEF

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A. REPLY ARGUMENT

1. The evidence was insufficient to prove intent to deliver.

Mr. Ryan was not properly found guilty of intent to distribute the drugs that he was found in constructive possession of, in the Chevy Blazer he had been riding in with his girlfriend. See AOB, at pp. 9-15; 4RP 453-55. Respondent State of Washington briefly addresses Mr. Ryan's argument of insufficiency of the evidence to support possession with intent to deliver. SRB, at pp. 5-7.

Respondent emphasizes that police believed they had observed Mr. Ryan engaged in a hand-to-hand transaction in the parking lot, when he was leaning into the window of a person's SUV and talking to another individual. Mr. Ryan then got into the Chevy. SRB, at pp. 2-5.

However, no drugs, or money, were ever seen in either individual's hands. AOB, at p. 5 (citing 3RP 198-99, 200-01); AOB, at pp. 11-13 and n. 2. As the crime profiler testified, persons engaged in delivery of controlled substances generally receive money in exchange for the drugs. 3RP 316-17, 319-21. Thus even the State's crime witness implicitly, but plainly opined that Mr. Ryan, in this respect, was not like a drug dealer. Id.

In fact, no money was found anywhere - not on Mr. Ryan as noted, but also in the Chevy that Mr. Ryan was a passenger in. 3RP 247, 240-42, 247. Of course, receipt of cash in exchange is not necessary to commit the

offense of delivery of drugs. AOB, at p. 11. But proof of possession with intent to deliver is highly fact-specific, and is a mixed question, partly one of law. AOB, at pp. 11-12. Respondent does not acknowledge the absence of cash. See SRB, at pp. 5 to 7. See AOB, at pp. 11-12 (citing State v. Goodman, 150 Wn.2d 774, 783, 83 P.3d 410 (2004) (discovery of six baggies of drugs, a scale, and additional baggies was marginal proof of delivery, but for further evidence of an actual exchange of drugs for money), at p. 12 (citing State v. Thomas, 68 Wn. App. 268, 843 P.2d 540 (1992), review denied, 123 Wn.2d 1028 (1994) (\$400 in cash supported proof of drug dealing).

It is true that one of the two safes in the vehicle had a scale and baggies. But as Goodman makes clear, without money - anywhere - the claim that a defendant is attempting to be a drug seller, or that he has just completed a drug transaction, rings more hollow. 4RP 553-556.

The Respondent implies that Ms. Kittleson must have been lying when she made statements at the scene that any drugs and a gun were hers, especially where Kittleson stated that she didn't want her boyfriend to get in trouble. SRB, at p. 7; 4RP 377. The State argued she was dishonest because otherwise this would be inconsistent with the State's rush to judgment. See 5RP 560-62 (State's closing argument and defense objection to prosecutor arguing that Ms. Kittleson was not believable). But even if, as the

Respondent argues, Kittleson was trying to take responsibility so Mr. Ryan would not get in trouble, this also is entirely consistent with simple possession of illegal drugs. Mr. Ryan may have had constructive possession of the drugs (which in fact does not require any knowledge whatsoever), but there was insufficient evidence that he had actual intent to sell drugs.

The evidence was insufficient. The State makes no mention of the case of State v. Cobelli, 56 Wn. App. 921, 923-25, 788 P.2d 1081 (1989), wherein evidence that the defendant engaged in a series of short conversations with several “clusters” of people in a known high-drug area, and was carrying several baggies containing a total of 1.4 grams of marijuana on his person, was deemed insufficient to prove intent to deliver. See AOB, at pp. 14-15. The conviction should be reversed.

2. The evidence was insufficient to prove that Mr. Ryan was “armed” with a firearm while in commission of the offense.

Mr. Ryan was not armed with the gun found in the safe behind his passenger seat at the time he was arrested and found to have drugs in his constructive possession. AOB, at pp. 15-22. There was neither “accessibility,” nor “nexus,” and the defendant’s constructive possession of an unloaded gun closed inside a safe at the same time as a crime was allegedly ongoing does not establish either. Neither the defendant’s fingerprints or his DNA were found on either of the two safes that were in the Chevy, or the gun, although it appears that whatever might have been located

on the gun as far as DNA had not been deemed important or helpful to the State's case. See supra, and 3RP 296-97 (forensic scientist noting, "I did collect swabs from this firearm but I'm not sure where the swabs went").

In this case it was also undisputed that one of the safes was a combination-lock, and the other was a key lock. 4RP 387. No key was found during the search of either the Chevy or the search of Mr. Ryan. 3RP 247, 248, 4RP 418-20. Ms. Kittleson, as she testified, had the keys to the key safe around her neck, and she kept it locked. 4RP 439. More precisely for purposes of sufficiency of the evidence in respect to all counts was that both safes had pry marks or nicks that were consistent with the safes having to have been "breached" in order for the police to access them during the warrant search. 3RP 234, 4RP 388.

Deputy Bray stated, as to the safe in which a handgun was found: he said "I do not remember" when asked whether it was locked or unlocked when the police seized it. 3RP 234. Then, even though the prosecutor was questioning him about whether, in his experience, he had known such safes to be used to conceal firearms, Deputy Bray instead remarked, "Really, it looks like there might be some pry marks here and here." 3RP 234.

This was the black Honeywell key-lock safe. 3RP 247-58. Deputy Bray at one point testified that he and Officer Huber would not have been the

ones who opened the safe by breaching it. 3RP 248. But the safe did have pry marks on it. 3RP 248. Bray then testified:

Q. Okay. You don't remember discussing it with my investigator, saying it would have been breached?

A. Did I say that it was breached or it would have been breached?

Q: Did you say it would have been breached if you had to access it?

A: Yes.

3RP 249. See AOB, at p. 7. The Respondent emphasizes that Deputy Huber stated that "there would be substantially more damage to the safe." SRB, at p. 3 (citing 4RP 424). But what Deputy Huber testified to was that the safe containing the gun exhibited pry marks or indentations consistent with the police having found it necessary to break into it, 4RP 386-87, that with regard to the locking mechanism that "usually" the damage to the lock is more extensive, 4RP 387, and that there were scratches, indentation and divots into the rubber or molding of the safe and scratches on the locking mechanism. 4RP 410. Although typically prying open a safe would cause significant damage, the tool the deputy described as used to breach safes could certainly, he said, be inserted into the crease opening. 4RP 411-12.

Deputy Huber also stated he could not recall if the safes had to be breached or if they were open, 4RP 409-10, and again that he could not remember. 4RP 412.

Q. Actually, you don't remember if you breached the safes. Is that fair to say?

A: No, sir.

4RP 426. And Huber ultimately ended by agreeing that he did not recall whether the safes had to be breached or not. 4RP 426.

After all of this, in closing argument, the prosecutor stated, “It really doesn’t matter” whether the safes were locked or unlocked 5RP 566. In this case, even if the gun was merely inside a closed container in the proximity of Mr. Ryan, constructive possession - and even “close proximity” - does not establish being “armed.” AOB, at pp. 19-20 (citing, *inter alia*, State v. Brown, 162 Wn.2d 422, 431-32, 173 P.3d 245 (2007)).

Respondent emphasizes that being a drug dealer is an “ongoing” crime, see SRB at pp. 8, 9, 10, and cites State v. Eckenrode, 159 Wn.2d 488, 150 P.3d 1116 (2007) for the rule, as stated in its brief, that “a firearm found in proximity to an ongoing criminal enterprise is sufficient to support a firearm enhancement.” SRB, at p. 8. But the rule of Eckenrode is that more than close proximity is required - a person is “armed with a firearm” during the commission of an offense only if the person could both (1) easily access and readily use a weapon, and (2) a nexus connects the person, the weapon, and the crime. Eckenrode, 159 Wn.2d at 490-91. There, there were *res gestae* statements showing the defendant was firing the weapon, he had a police scanner at the location of his marijuana grow operation, and there was evidence that the weapons were there as part of a coordinated effort to protect

the ongoing crime - not just ownership or possession of a gun, by a person who also committed a crime. Eckenrode, at 494-95.

This is important because contrary to the manner in which the Respondent argues it, the nexus requirement “serves to place parameters on the determination of when a defendant is armed, especially in the instance of an ongoing crime such as constructive possession of drugs.” (Emphasis added.) State v. Sassen Van Elsloo, 191 Wn.2d 798, 827, 425 P.3d 807 (2018). The rule is a limiting one: A person will not be deemed armed for enhancement purposes simply because of the unfortunate fact of merely constructively possessing a firearm at the same time that an ongoing crime is being committed. See State v. Blackwell, No. 51096-1-II, 2019 WL 2809132, at *6 (Wash. Ct. App. July 2, 2019) (nexus requirement guards against a defendant being deemed armed simply on basis of being an owner or in possession of a gun who also commits a crime) (unpublished, cited pursuant to GR 14.1 only); see also, Van Elsloo, 191 Wn.2d at 830 (gun was “there to be used” in the crime of distribution of drugs from a car where “the gun was placed in the car with its grip facing at an angle toward the passenger compartment of the car, making it easy for someone entering the car to quickly grab the gun, . . . the gun had a shell in the magazine that could have been readily chambered and fired at another person [and] the shotgun

was kept out of the locked safe, unlike the revolver and semiautomatic handgun, which were not the subjects of the firearm enhancements.”).

Also illustrative of both the accessibility and nexus requirements is State v. Simonson, 91 Wn. App. 874, 882, 960 P.2d 955 (1998), where the Court stated that more than dominion and control is needed to find a person is “armed” with a deadly weapon - there also must be evidence that the weapon is “ ‘readily available for use,’ either offensively or defensively, during the commission of the crime.” Simonson, 91 Wn. App. at 882.

Contrary to the State’s arguments, this case is not like Simonson, wherein the defendant was running an “active methamphetamine manufacturing site” and one could, including because most of the guns were loaded (a revolver, a Lorcin semi-automatic pistol, a Walther semi-automatic pistol, two shotguns, and a Ruger assault rifle), along with other evidence, “infer that the purpose of so many weapons was to defend the manufacturing site if it was attacked.” Simonson, 91 Wn. App. at 883. See SRB, at pp. 9-10.

In this context of proof beyond a reasonable doubt that the gun was there to defend the crime, rather than the State’s citation to Simonson, this case is more like State v. Valdobinos, 122 Wn.2d 270, 273-74, 281-82, 858 P.2d 199 (1993). There, in the conviction of Valdobinos and Garibay for conspiracy to deliver cocaine and delivery of cocaine, the presence of a

“black bag containing \$1,875 [and] 846 grams of cocaine” and an “unloaded rifle” under the bed was not sufficient proof of the defendant being “armed” during the crimes and was thus insufficient to support a firearm enhancement. Valdobinos, at 273-74 (and contrasting State v. Sabala, 44 Wn. App. 444, 445-48, 723 P.2d 5 (1986) (“armed with” as used in present statute was not different from term “armed with or in possession of” as used in former statute and defendant, who was in the process of delivering cocaine to the informant by driving it to arranged location in his car, was armed with a deadly weapon under 9A.04.110(6) when “the gun, fully loaded, was located beneath the driver’s seat, with the grip easily accessible”).

Respondent makes no effort to distinguish the appellant’s citation to State v. Gurske, 155 Wn.2d 134, 139, 143-44, 118 P.3d 333 (2005), where an enhancement was reversed. There, police found a zipped-up backpack on the back seat of the defendant’s truck that contained an unloaded pistol, a loaded magazine, and drugs, and the defendant would need to exit the vehicle to access the pack. Gurske, 155 Wn.2d at 17-18; AOB, at pp. 17-18, 20.

Here, the defendant was outside the Chevy at the time he was allegedly acting as a seller in the parking lot, and he was a distance away from it at the time. And whether the safe was locked or unlocked, much more so than a zippered bag, the location of this gun inside that lockable container demonstrated securing of the item, rather than it being readily

accessible and available or connected to the drug dealing or possession for dealing. Under the facts of this case, especially where the question on review is in part one of law, this is neither accessibility, nor “nexus,” the twin criteria for being proved beyond reasonable doubt to be “armed” under RCW 9.94A.533(3). Where either criteria fails, so must the charge. The enhancement should be reversed.

3. “Opinion” testimony -- which is normally inadmissible - might be proper where the witness and subject meet ER 702, but no witness, including experts, may opine as to credibility or guilt.

(a). The error was preserved. Defense counsel objected, first, under the rule for experts, ER 702, arguing that one or both of the criteria for expert testimony - specialized knowledge, and helpfulness to the jury - were not satisfied. 1/2/19RP at 11-12.

In addition, counsel also argued that the sort of opinion being proffered would invade the jury’s exclusive province to decide credibility and to decide whether the crime of being a drug dealer, and the enhancement for being armed, were committed (i.e., guilt). 1/2/19RP at 11-12; CP 121-22. Mr. Ryan’s counsel argued the jury could properly decide the case by applying the law to the testimony of the officers involved in the case as to what they observed, after determining for themselves whether the fact witnesses should be believed. CP 121-22; 1/2/19RP at 11-13. The jury could do this without an expert on drug crime detection.

The prosecutor's argument was like that advanced in the many well-known cases where the issue is whether an "expert" in the type of crime charged (usually drug) is testifying in a manner that simply becomes an opinion on credibility and/or guilt. The prosecutor's primary insistence below was that Detective Jessie Hotz "is more than qualified as a drug sales expert" who could testify that the facts of the case (which he had reviewed) were common, in his experience, where the defendant had "intent to deliver." 1/2/19RP at 13-14. The prosecutor's manner of casting the argument almost attests to a lack of understanding as to why that sort of testimony would completely invade the province of the jury.

There was no failure to preserve this error - the Respondent misreads the record. The case law that determines the impropriety of this sort of testimony and thus whether its exclusion is required, along with the black letter objections, are commonly known, not obscure. An "expert" in "the crime" may in fact end up effectively testifying that the defendant is guilty as a drug dealer, and further, when the witness is also a respected law enforcement officer, the jury will likely find this invasion of its own province to be highly persuasive, because the jury has no idea that the witness should not be so opining - indeed, jurors are generally eager for an expert to point them in the direction of how to decide. See AOB, at pp. 24-25 (citing State

v. Carlin, 40 Wn. App. 698, 700-01, 700 P.2d 323 (1985); State v. Notaro, 161 Wn. App. 654, 661, 255 P.3d 774 (2011)).

“The issues are related.” AOB, at p. 27. Expert witnesses are witnesses who are allowed to opine in front of the jury (unlike lay witnesses, see ER 701), but when an expert witness putatively falling under ER 702 is in fact not necessary to help the jury understand complex facts, and where the witness is simply an expert in ‘detecting’ the crime of intent to deliver (i.e., detecting guilt), the defendant’s right to have the jury assess the facts and decide guilt for itself is violated. See, e.g., AOB, at p. 26-27 (comparing State v. Cruz, 77 Wn. App. 811, 894 P.2d 573 (1995) (jury needed special interdiction expert to understand arcane world of heroin sale where defendant handles neither drugs or money during the transfer) to State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987) (expert testifying about typical characteristics of an offender of this crime left the jury with only one possible expert-supplied inference: that the defendant was guilty of the offense).

The trial court properly ruled in accordance with the defense - that Detective Hotz would be built up as an expert and testify about the circumstances such as the amount of drugs, and the fact that scales were found - where this should come from the factual observations of the involved officers who were already testifying:

THE COURT: So my question is, you don’t have one of the arresting officers who can say, that’s a significant

amount and scales are used? Here is my concern, and I'll tell you why, and why I think Mr. Trujillo's point is appropriate: This is a detective who doesn't have anything to do with the case, who you're going to build up his expertise[.]

1/2/19RP at 14-15. The prosecutor's protestations that the witness would simply be "tying things together" as to the evidence, was a revealing statement showing that the witness would indeed be opining on guilt. It is the jury that 'ties things together' by applying the law, after judging the facts.

However, Detective Hotz would ultimately be allowed as a witness, and he did testify in exactly the manner that the law deems inappropriate, because the trial court later reversed its ruling and denied the defense motion to exclude Hotz.

The trial court's first ruling granting the defense motion was clear - the court noted it might change its mind, as every trial court is entitled to do - but its ruling granting the defense motion to exclude the witness was a final ruling. 1/2/19RP at 15 ("So I'm going to grant the motion.").

Respondent erroneously states that the "court only made one final ruling" which was the later ruling by the court allowing Hotz. See SRB, at pp. 12-13. This is not correct. The foregoing discussion of the defense motion by the court and the parties, and the court's ruling, was part of motions in limine. 1/2/19RP at 5 (court, requesting that parties now litigate the motions in limine). After addressing other motions, the court then turned

to the next defense motion - properly describing it as the “Motion to exclude testimony of Jesse Hotz.” 1/2/19RP at 11. And after argument, the court granted that motion. 1/2/19RP at 15 (“So I’m going to grant the motion.”).

The trial court’s later ruling was also clear, and it, too was a final ruling. The court, “[o]n further reflection” changed its mind - as the court is entitled to do - and denied the defense motion to exclude. 1/2/19RP at 19 (“On further reflection, and looking at the rules, I think that I will allow Detective Hotz to testify [but] I would like it narrowed, if possible, in terms of what his experience is and sort of what’s typical.”).

The Respondent, erroneously arguing that this was the court’s only final ruling, may have been looking to an earlier statement. When the court earlier stated, before addressing an issue regarding evidence about the crime of a completed drug delivery, that it wanted to address “a couple of things that I think I reserved or something, or equivocated on this morning,” that language and *ex post facto* adjective regarding the earlier session did not somehow render its prior ruling a non-final ruling. See 1/2/19RP at 116-17. At that time, the court had granted the motion to exclude. 1/2/19RP at 15 (“So I’m going to grant the motion.”). The court was not ‘reserving ruling’ on the motion in limine, nor was it indicating that counsel should re-raise the motion later to get a ruling, nor did the court ask that counsel provide further authority. See 1/2/19RP at 11 to 15.

As noted, Respondent erroneously represents that the “court only made one final ruling” which was the later ruling by the court allowing Hotz as a witness. See SRB, at pp. 12-13. Yet, next, the Respondent inconsistently argues that what it has just labeled a “final ruling” several sentences earlier was actually “tentative” because the court used the words “think” and “suppose.” SRB, at p. 12. This is confusing and wrong. The reconsidered ruling was final. There is no merit to the State’s argument that Mr. Ryan’s counsel needed to say more after his motion was, with this ruling, denied, and State v. Powell is inapposite. SRB, at p. 12; State v. Powell, 126 Wn.2d 244, 257, 893 P.2d 615 (1995) (where judge reserved ruling as to Cowell’s testimony and indicated “that defense counsel needed to provide further support for exclusion” the judge had “only made a tentative or advisory ruling and defense counsel was required to object again to preserve the error for appeal). The court’s ruling allowing Hotz as a witness was final.

As the court made clear, it had *sua sponte* reconsidered its earlier ruling, and was now denying the motion to exclude, which it had previously granted. 1/2/19RP at 117 (“So defense No. 3 was to exclude [Detective] Jesse Hotz and I’m going to deny that. I’ve reconsidered”). The court ruled. When a trial court issues a final ruling denying a motion to exclude evidence, the party need not argue further. Powell, at 256 (the losing party is deemed to have a standing objection where a judge has made a final ruling on the

motion in limine, “[u]nless the trial court indicates that further objections at trial are required when making its ruling”). The defense objected a couple of times during Hotz’s testimony, and indicated that it had no “further” objection to the witness’s qualifications. 1/7/19 at 318. The Opening Brief incorrectly described this as expressly being deemed a “standing objection” to Hotz’s testimony. AOB, at p. 25. But defense counsel did not need to make any further objection - he had a standing objection, as a matter of law, by virtue of being the losing party *in limine*. Powell, *supra*.

Additionally, the motion, written and oral, and the court and parties’ litigation of the motion, completely refute any suggestion that the error was not preserved. The matter was thoroughly argued. Respondent misemploys the Kirkman Court’s statement, “The assertion that the province of the jury has been invaded may often be simple rhetoric.” State v. Kirkman, 159 Wn. 2d 918, 928, 155 P.3d 125 (2007); see SRB, at p. 13. The Court was noting that the phrase itself, proffered by the appellant on appeal in the case in an attempt to argue manifest constitutional error under RAP 2.5(a)(3) where no objection had been made below, was at common law “not a doctrine but an explanation of the rationale behind the common law’s evidentiary rule against admission of expert testimony on ultimate issues.” Kirkman, at 928 n. 1. The Court was in no way ruling that a trial motion or objection including that language would fail to preserve objection to improper opening

on credibility or guilt. As is so often said, “No witness, lay or expert, may testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.” AOB, at p. 29 (quoting State v. Black, supra, 109 Wn.2d at 348).

What the Kirkman Court was holding was this: “Admission of witness opinion testimony on an ultimate fact, without objection, is not automatically reviewable as a ‘manifest’ constitutional error” simply because the appellant uses the phrase or similar in the appeal briefs. State v. Kirkman, 159 Wn.2d at 936. That holding is not pertinent to this case, where the objection was laid at trial. State v. Elliott, No. 35665-5-III, 2019 WL 626238, at *5-7 (Wash. Ct. App. Div. 2, Feb. 14, 2019) (unpublished, cited pursuant to GR 14.1(a) only) (pursuant to Kirkman, opinions “as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses . . . violates the defendant’s constitutional right to a jury trial . . . whether made directly or by inference”). Where counsel properly objected to “opinion testimony” or to invading the “province of the jury,” these “objections [were] adequate to preserve the error.” Elliott, at *7. The Respondent’s argument that these errors were not preserved below is without merit.

(b). Reversal is required. As noted, the trial court reversed its ruling for the defense, and held that the State could proffer testimony from Hotz if it were narrowed in terms of his experience, and testimony as to

typicality. 1RP 117-18. There is no merit to the Respondent's argument that the error was not prejudicial. SRB, at p. 14. Mr. Ryan relies on his Opening Brief. AOB, at pp. 25-32. The State argues that the expert could not have said anything prejudicial to Mr. Ryan because everything he said about the facts amounting to drug selling could be applied to Ms. Kittleson. SRB, at p. 15. In the same vein, Respondent argues that the detective's "opinion was founded, not on the behavior of the defendant, but on the materials found in the car driven by Ms. Kittleson." SRB, at p. 15.

This argument does not have merit. Mr. Ryan was on trial, not Ms. Kittleson. The drug crime expert was placed before the jury to persuade the jurors that Mr. Ryan was, by dint of Hotz's expertise at detecting intent, guilty as charged along with a firearm enhancement. Although certainly the detective's testimony would implicate Ms. Kittleson as well, the prejudice to Mr. Ryan caused by having a witness improperly opine on guilt is not lessened in its prejudice simply because another non-charged person was implicated. There can be no question that prejudice was caused to Mr. Ryan on the charge and the enhancement when Hotz testified that "everything that is sitting right there is common trade craft of a narcotics dealer" and stated,

You're going to have the product, the baggies, the scale, possibly a firearm, either on the individual or within close proximity. Narcotics, the baggies, the scale, that's intent to distribute.

(Emphasis added.) 3RP 326. This testimony exemplifies how improper it is to have a drug expert tell the jury that the facts amount to “intent.” Hotz repeatedly opined that the asserted facts of this case involving Mr. Ryan, including his “hand-to-hand transactions” and his allegedly “work[ing] in conjunction with another individual” showed he was a seller. 3RP 324-26.

The error and its harm sound out consistently and together: a police officer who opines that a person’s items in his possession are the tools of drug dealing and that his actions are those of a person with intent to distribute is exactly what the objectionable testimony is, and show why it was not harmless. AOB, at pp. 25. The State of course is forced to agree that “Hotz’s ‘intent to distribute’ testimony was significant,” but then the State contends that the impropriety of a witness who is an expert at intention-detecting “was dwarfed by Ms. Kittleson’s testimony that she” was the drug seller. SRB, at p. 16. This same theme, that the testimony hurt the uncharged co-participant and did not prejudice the defendant, is no more colorable when repeated. SRB, at p. 16.

This case was squarely aimed at the person charged, and the allegation was that Mr. Ryan was the drug dealer because he had the trappings of one, and acted like one. Hotz testified, as an expert, about how this case matched his area of knowledge in its sequence of events just like the many “controlled buys” he had participated in, using “confidential

informants” and “buy money,” where criminals used “lock box” safes. 3RP 319-21. Hotz was a “certified peace officer,” former undercover officer, current member of “the special assault unit,” marine rescue diver, and current “S.W.A.T. Team” operator who was inherently authoritative in the eyes of the jury, and when he personally opined as to the guilt of the defendant, those jurors would have been rightly impressed. 3RP 314-15. But this is not how trials are supposed to work. Improper opinions on guilt from such an impressive law enforcement officer are ones, Washington case law recognizes, that lay jurors are all too eager, if unconsciously, to credit, especially when the person is given the mantle of an expert, as here. This Court should reverse.

B. CONCLUSION

Based on the foregoing and on the Appellant’s Opening Brief, Mr. Brandon Ryan respectfully requests that this Court reverse the judgment and sentence of the Superior Court.

Respectfully submitted this 26th day of February, 2020.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

STATE OF WASHINGTON,)	
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v.)	NO. 53171-2-II
)	
BRANDON RYAN,)	
)	
Appellant.)	

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