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NO. 53171-2

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

BRANDON RYAN,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann Van Doorninck

No. 17-1-02386-0

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE ISSUES

- A. Does substantial evidence support appellant's conviction for unlawful possession of a controlled substance with intent to deliver?
- B. Does substantial evidence support the firearm enhancement applied to appellant's conviction for unlawful possession of a controlled substance with intent to deliver?
- C. Did the trial court properly deny appellant's motion in limine to totally bar Detective Hotz from testifying?
- D. Did appellant's motion in limine to totally bar Detective Hotz from testifying serve to preserve appellant's evidentiary claims raised for the first time on appeal?
- E. If Detective Hotz should not have testified, was his testimony harmless nonconstitutional evidentiary error?
- F. Has appellant raised a constitutional claim for the first time on appeal?
- G. Has appellant presented a claim of manifest constitutional error?
- H. If appellant has presented a claim of manifest constitutional error, was Detective Hotz' opinion testimony as to "intent to distribute" harmless beyond a reasonable doubt?

II. STATEMENT OF THE CASE

On June 20, 2017 Pierce County Sheriff's Deputies Bray and Huber were out patrolling the South Hill area of Puyallup. 1/7/19 VRP 194-95. At about 7:00 in the morning they were driving through the Fred Meyer parking lot in a marked patrol vehicle. 1/7/19 VRP 195-96 (driving), 197-98, 369 (vehicle marked). There, they saw Brandon Ryan (hereinafter defendant) standing next to a dark colored SUV. 1/7/19 VRP 196. As the

deputies got closer, defendant looked back at them and walked away. 1/7/19 VRP 196 (Bray), 368-69 (Huber).

Deputy Bray testified that he saw defendant's upper torso leaning into the passenger side of the SUV. 1/7/19 VRP 196-97. Defendant then "turned around, removed his hands that were inside the vehicle and turned and walked briskly from us." 1/7/19 VRP 197. Defendant looked shocked that the police were behind him. 1/7/19 VRP 197.

Deputy Huber testified that he witnessed a hand to hand exchange between defendant and the driver of the darker color SUV. 4/1/08 VRP 365-67. Deputy Huber demonstrated for the jury

leaning in to where my upper torso would be actually inside the interior of the vehicle and there was an item being passed to the driver of the vehicle. So the individual is outside leaning in through the window, open window, passing an item to the driver. So there was a reach out of the hand of not only the individual standing outside of the car's hand, but the person who's in the driver's seat. So both individuals had their hands reached out.

1/8/19 VRP 366.

After seeing he deputies, defendant hastily¹ walked to a red Blazer and entered the car on the passenger side. 1/7/19 VRP 203, 1/8/19 VRP 369. The driver of that car was defendant's girlfriend of eleven years,

¹ 1/8/19 VRP 371.

Kelsey Kittleson. 4 VRP 455. There was methamphetamine in that car and Ms. Kittleson testified that she was trying to sell it. 4 VRP 455-56.

The investigating deputies observed two safes inside the red Blazer. 1/8/19 VRP 374. One safe was on the middle arm rest, and there was another safe directly behind the front passenger seat (directly behind defendant). 1/8/19 VRP 374-75. Ms. Kittleson told Deputy Huber that there would be methamphetamine, a gun, and an extended magazine in the safe. 1/8/19 VRP 377. Ms. Kittleson also told Deputy Huber that she would take responsibility for the items within the safe, as she did not want her boyfriend "to get in trouble." 1/8/19 VRP 377.

A search warrant was obtained for methamphetamine, the firearm, and the extended magazine which Ms. Kittleson said was inside the safe. 1/8/19 VRP 383-84. Inside the safe found directly behind the front passenger seat, a Taurus nine millimeter handgun was found. 1/1/19 VRP 392-93. Deputy Huber could not recall whether or not this safe was locked or unlocked at the time the search warrant was served. 1/8/19 VRP 387. However, he did testify that "had I needed to breach this or had anybody who was helping us to breach this, I do believe in my opinion that there would be substantially more damage to the safe." 1/8/19 VRP 424.

Inside the smaller safe (the one between the front seats) methamphetamine was found.² The methamphetamine was valued at about \$400.00. 1/7/19 VRP 322. The methamphetamine was contained in two packages. 1/7/19 VRP 223-24. Deputy Huber testified that the safe between the two seats was unlocked.³ A bunch of empty baggies (about 50 or 75) were also found in the safe between the front seats.⁴ Baggies are used to repackage illegal drugs for sale. 1/7/19 VRP 221-22, 318. A digital scale was also found in the safe. 1/7/19 VRP 215-16. The digital scale was of the type that street level drug dealers would use. 1/7/19 VRP 321. A metal spoon was also found in the safe.⁵

An extended magazine for a handgun was found in one of the safes inside the Blazer.⁶ Male clothing was also found inside the Blazer. 1/8/19 VRP 392, 446. Speakers belonging to defendant were inside the Blazer.

² A forensic analyst testified that Exhibits 28A & 28B contained methamphetamine. 1/7/19 VRP 273-274. Ms. Kittleson testified that the Exhibit 28A was the methamphetamine that was in the safe between her and defendant. 1/8/19 VRP 455. Deputy Bray identified Exhibit 28, an envelope which contained the two bags of methamphetamine in plastic bags. 1/7/19 VRP 223-24. Deputy Huber testified about the recovery of the methamphetamine from the safe. 4/1/19 VRP 388-89.

³ Deputy Huber apparently had no recollection of whether the safe was locked or unlocked at the time the warrant was served. 1/8/19 VRP 386-88. He concluded that the safe was unlocked because he did not have to damage the safe to get into it. *Id.*

⁴ 1/7/19 VRP 220-23.

⁵ 1/7/19 VRP 222. The spoon was admitted as Exhibit 31. 1/7/19 VRP 223.

⁶ 1/7/19 VRP 227 (Exhibit 35, an extended magazine admitted); 1/7/19 VRP 216-17. Deputy Bray could not remember where in the Blazer the extended magazine was found, but it was found during the search. *Id.* Ms. Kittleson told Deputy Huber that the extended magazine was in the safe. 1/8/19 VRP

1/8/19 VRP 480. A remote control car belonging to defendant was also in the Blazer. 1/8/19 VRP 445-46.

III. ARGUMENT

A. **Sufficient evidence supports defendant's conviction for possession with intent to deliver methamphetamine.**

To determine whether sufficient evidence supports a conviction, the appellate court must view the evidence in the light most favorable to the State and determine whether any rational fact finder could have found the elements of the crime beyond a reasonable doubt. *State v. Engel*, 166 Wn.2d 572, 576, 210 P.3d 1007 (2009). In claiming insufficient evidence, the defendant necessarily admits the truth of the State's evidence and all reasonable inferences that can be drawn from it. *State v. Drum*, 168 Wn.2d 23, 35, 225 P.3d 237 (2010). Any inferences must be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Homan*, 181 Wn.2d 102, 106, 330 P.3d 182 (2014). “[T]he specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” *State v. Delmarter*, 94 Wn.2d 634, 638, 618 P.2d 99, 101 (1980).

At 7:00 in the morning the defendant was in a Fred Meyer parking lot, but he was not in the process of buying anything at the store—his upper torso was leaning into the passenger side of an SUV. 1/7/19 VRP 197. He was conducting a hand to hand exchange with the driver of the SUV. 1/8/19

VRP 366. When he saw a police car approaching, he hastily walked back to the Blazer driven by his girlfriend,⁷ containing an unlocked⁸ safe which held \$400.00⁹ worth of methamphetamine¹⁰ along with a scale,¹¹ a spoon,¹² and empty baggies.¹³ Those tools of the drug trade were right next to defendant.¹⁴ A pistol was available to defendant in an unlocked safe right behind defendant's seat.¹⁵ A reasonable juror could fairly conclude that defendant was trying to sell the methamphetamine to the occupant of the SUV in the Fred Meyer lot when he was interrupted by the police.

In addition to the possession of drug dealing tools (the safe, the pistol, the scale, the baggies and spoon in a safe), the evidence of intent to deliver is strong. Defendant's girlfriend (the driver of the car) testified that earlier in the day she was trying to sell the methamphetamine that was in the car 1/8/19 VRP 455-56. She said she was trying "to get rid of" the methamphetamine. 1/8/19 VRP 454. This is evidence that the

⁷ Defendant's hasty retreat to the Blazer was related by Deputy Huber 1/8/19 VRP 369 and Deputy Bray 1/7/19 VRP 203.

⁸ 1/8/19 VRP 386-88.

⁹ 1/7/19 VRP 322.

¹⁰ 1/7/19 VRP 273-274.

¹¹ 1/7/19 VRP 215-16.

¹² 1/7/19 VRP 222.

¹³ 1/7/19 VRP 220-23.

¹⁴ The safe was between defendant and Ms. Kittleson. 1/7/19 VRP 212-13.

¹⁵ 1/1/19 VRP 392-93 (firearm); 1/8/19 VRP 424 (unlocked). Deputy Bray testified that 9 mm bullets were found in the Blazer. 1/7/19 VRP 228-32. See also 298-99. Ms. Kittleson testified that the gun and the bullets would be found in "the safe." 1/8/19 VRP 377.

methamphetamine was not for anyone's personal use. A juror could infer that defendant's actions in the Fred Meyer parking lot amounted to helping his girlfriend "get rid of" that methamphetamine, and that his hasty walk back to his automobile after spotting the deputies was consciousness of that guilt.

Furthermore, defendant's girlfriend told the investigating deputies "that she would take responsibility for the items within the safe, as she did not want her boyfriend to get in trouble." 1/8/19 VRP 377. A juror could readily interpret this statement as defendant's girlfriend's attempt to protect her boyfriend—who was doing something wrong—from getting into trouble. 1/8/19 VRP 377. Deputy Huber testified "Ms. Kittleson admitted there would be a gun and meth inside the safe. Not only a gun, but she also told me there was an extended magazine." *Id.* This Court should note that Exhibits 16 and 18 depict the small safe where the methamphetamine was found. That safe is large enough to contain the methamphetamine and the drug paraphernalia, but nowhere near large enough to also contain a 9mm pistol. A jury could have reasonably concluded that Ms Kittleson's attempt to exonerate defendant was a lie because Ms. Kittleson did not know just which safe contained the methamphetamine.

Sufficient evidence supports the jury's decision that defendant possessed methamphetamine with intent to deliver.

B. Sufficient evidence supports the firearm enhancement in this case.

“[F]or a person to be armed during the commission of a crime, the weapon must be easily accessible and readily available for use for either offensive or defensive purposes.” *State v. Sassen Van Elsloo*, 191 Wn.2d 798, 826, 425 P.3d 807 (2018). The State must also offer sufficient evidence “of a nexus between the defendant, the weapon, and the crime.” *Id.* 191 Wn.2d at 827. CP 178.

A firearm merely found in proximity to a controlled substance will not support a firearm enhancement. *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). On the other hand, a firearm found in proximity to an ongoing criminal enterprise is sufficient to support a firearm enhancement. *State v. Eckenrode*, 159 Wn.2d 488, 491, 150 P.3d 1116 (2007); *State v. Neff*, 163 Wn.2d 453, 463-64, 181 P.3d 819 (2008) (plurality opinion); *Sassen Van Elsloo*, 191 Wn.2d at 802-03 (facts), 826-31 (analysis).

Defendant, like the defendant in *Sassen Van Elsloo*, was engaged in an ongoing drug crime. He and the driver of the Blazer were both trying to sell the methamphetamine contained inside the car. Viewing the evidence in the light most favorable to the State, the sheriff’s deputies interrupted defendant’s effort to sell that methamphetamine. When startled, and conscious of his criminal guilt, defendant hastily walked back to the

Blazer—where the drugs, the gun, and the driver were located. In this case the firearm¹⁶ was in an unlocked safe in the seat right behind defendant in the Blazer, in very close proximity to the 22 rounds of ammunition,¹⁷ drugs, scale, packaging material, and spoon found located next to defendant. This is consistent the holding of *Sassen Van Elsloo*, 191 Wn.2d at 830-31. Taking all the evidence in the light most favorable to the state, the pistol was easily accessible and readily available for use for either offensive or defensive purposes. The firearm was “there to be used” in the commission of a continuing drug crime, not the mere act of simple possession. *Sassen Van Elsloo*, 191 Wn.2d at 830-31.

This case is sufficiently like *State v. Simonson*, 91 Wn. App. 874, 883, 960 P.2d 955 (1998), cited with approval in *State v. O’Neal*, 159 Wn.2d 500, 505, 150 P.3d 1121, 1123–24 (2007), where the Supreme Court noted

In *Simonson*, the court upheld the jury's verdict, finding that a jury could infer from the presence of loaded guns at the site of an active methamphetamine manufacturing site that the weapons were there to protect drug production. Judge J. Dean Morgan concluded:

Taken in the light most favorable to the State, the evidence here shows that [the defendants] were committing a continuing offense, manufacturing methamphetamine, over a six-week period of time. During some or all of that time, they kept seven guns on the premises. It is reasonable to

¹⁶ An expert testified that the weapon was an operable firearm. 1/7/19 VRP 294.

¹⁷ Deputy Bray testified that 9 mm bullets were found in the Blazer. 1/7/19 VRP 228-32. See also 298-99. Ms. Kittleson testified that the gun and the bullets would be found in “the safe.” 1/8/19 VRP 377.

infer that not less than four were kept in a loaded condition...
. It is also reasonable to infer that the purpose of so many loaded guns was to defend the manufacturing site in case it was attacked. We conclude that the evidence is sufficient to support the deadly weapon enhancement.

Id. (quoting *State v. Simonson*, 91 Wn.App at 883).

A firearm is a firearm for enhancement purposes whether it is loaded or unloaded. CP 178 (defining firearm); *State v. Schelin*, 147 Wn.2d 562, 567–70, 575, 55 P.3d 632 (2002) (plurality opinion). In this case, there was no evidence that the firearm was loaded, but there was evidence that it was stored with the extended magazine (and inferentially the bullets) in the unlocked safe. 1/8/19 VRP 377;¹⁸ 1/8/19 VRP 424.¹⁹ The firearm was operable (1/7/19 VRP 294) and loading it would have been unproblematic. 1/7/19 VRP 308.

The nexus between the crime and the firearm in this case is supported by sufficient evidence—defendant was engaged in the ongoing criminal enterprise of drug dealing and the firearm he possessed is a tool of that trade. *Sassen Van Elsloo, supra*. The nexus between the defendant and the firearm is also supported by sufficient evidence, because the

¹⁸ Ms. Kittleson’s testimony that the gun and the extended magazine would be found in the safe. *Id.*

¹⁹ Detective Huber’s lay opinion testimony that he did not believe that the safe had been broken into. *Id.*

defendant was the person trying to sell drugs to the person in the SUV in the Fred Meyer parking lot at 7:00 a.m. in the morning.

Sufficient evidence supports the firearm enhancement in this case.

C. Defendant has failed to present evidentiary error.

1. The trial court properly denied defendant's ER 702 motion in limine seeking to preclude testimony from Detective Hotz. No other objection was preserved.

Defendant moved *in limine* pursuant to ER 702 to preclude the testimony of Detective Hotz in its entirety. CP 121-22; 1/2/19 VRP 11-15.

The basis of that motion was expressed in defendant's written motion:

ER 702 permits a qualified expert to offer an opinion if their scientific, technical, or other specialized knowledge will assist the trier of fact. No special skill, experience, knowledge, or education is required to formulate an opinion upon a matter that can be judged by people of ordinarily [sic] experience and knowledge. [citation omitted] A jury is capable of evaluating whether or not the gun at issue was used for the crimes charged and whether or not its storage are something that a drug dealer could do. Any testimony from a person asserting himself as an expert in drug dealer behavior would invade the jury's role in judging the credibility of other witnesses. Presumably the officers involved in the case will be capable of testifying about what they observed.

CP 121-22. Defense counsel's oral argument was consistent with that his written motion.²⁰ 1/2/19 VRP 11-13.

²⁰ Defense counsel's argument (which relied upon "presumabl[e]"²⁰ facts) did not include an offer of proof. *Id.*

The trial court properly denied defendant's *in limine* motion because in asking for the total preclusion of Detective Hotz' testimony, defense counsel was asking for too much. Courts have permitted expert testimony from law enforcement officers describing typical drug transactions. *State v. Avendano-Lopez*, 79 Wn.App. 706, 711, 904 P.2d 324 (1995); *State v. Cruz*, 77 Wn. App. 811, 815, 894 P.2d 573, 575 (1995). The trial court recognized that fact: "I think that I will allow Detective Hotz to testify. I would like it to be narrowed, if possible, in terms of sort of what his experience is and sort of what's typical." 1/2/19 VRP 117. The trial court's denial of defendant's *in limine* motion recognized existing caselaw and was correct.

When presented with defendant's motion *in limine* to preclude Detective Hotz' testimony *in toto*, the trial court only made one final ruling—that Detective Hotz' testimony was not totally precluded. 1/2/19 VRP 117. Petitioner preserved that one objection for appeal. He did not preserve the other objections now made for the first time on appeal. Under ER 103, an objection must be made to preserve an evidentiary error for appeal. *State v. Powell*, 126 Wn.2d 244, 257, 893 P.2d 615 (1995). Judge Van Doorninck's ruling with respect to every other aspect of Detective Hotz' anticipated testimony was explicitly tentative: "*I think* that I will allow Detective Hotz to testify. I *would like it* to be narrowed, *if possible*, in terms of sort of what his experience is and sort of what's typical." (emphasis added) 1/2/19 VRP 117.

If the trial court has made a definite, final ruling, on the record, the parties should be entitled to rely on that ruling without again raising objections during trial. When the trial court refuses to rule, or makes only a tentative ruling subject to evidence developed at trial, the parties are under a duty to raise the issue at the appropriate time with proper objections at trial.

When a ruling on a motion in limine is tentative, any error in admitting or excluding evidence is waived unless the trial court is given an opportunity to reconsider its ruling.

(internal quotation marks, braces, and citations omitted) *State v. Powell*, 126 Wn.2d at 256.

Defense counsel's *in limine* motion argued that nothing Detective Hotz could possibly²¹ say would be helpful to the jury and that "[a]ny testimony" from Detective Hotz "would invade the jury's role in judging the credibility of other witnesses." CP 121-22. This objection falls within the category of "simple rhetoric" dismissed in *State v. Kirkman*, 159 Wn.2d 918, 928, 155 P.3d 125 (2007). It is nowhere near sufficient to preserve a continuing objection to every possible testimonial statement that the expert may later provide at trial.

²¹ The word "possibly" is used because defense counsel's objection was unmoored to any particular factual statement Detective Hotz was expected to make. CP 121-22; 1/2/19 VRP 11-15. The record does not indicate any defense attempt to voir dire Detective Hotz on the subject matter of his proposed testimony.

At trial, defense made only one objection to Detective Hotz testimony which was overruled.²² 1/7/19 VRP 320. That testimony is not asserted as a basis for error. See Appellant's Brief at 23-33. None of the other asserted evidentiary errors are preserved for appeal. ER 103, *State v. Powell, supra*.

2. If permitting Detective Hotz to testify was erroneous pursuant to ER 702, then that error was harmless.

Defendant made an objection pursuant to ER 702 to preclude the testimony of Detective Hotz in its entirety. CP 121-22; 1/2/19 VRP 11-15. The trial court denied that motion. 1/2/19 VRP 117.

We will not reverse due to an error in admitting evidence that does not result in prejudice to the defendant. Where the error is from violation of an evidentiary rule rather than a constitutional mandate, we do not apply the more stringent harmless error beyond a reasonable doubt standard. Instead, we apply the rule that error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred. The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.

²² Detective Hotz testified that that the scale admitted into evidence had brown residue on it, and based on his experience, he "would believe that brown substance would probably likely be heroin— a controlled substance." 1.7/19 VRP 320. Defense counsel's only objection was that the opinion was "outside the witness' expertise." *Id.* No further argument or evidence was presented on that point at trial. *Id.*

(internal quotation marks and citations omitted) *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970, 995 (2004). Defendant has the burden of demonstrating prejudice on appeal. *Id.*²³

Detective Hotz presented no testimony linking defendant to the drugs in this case. See 1/7/19 VRP 314-331. Defendant's assertion that Detective Hotz "regale[d] the jury with [his] direct opinion on the defendant's guilt..." is unsupported by the record. Detective Hotz' opinion was founded, not on the behavior of defendant, but on the materials found in the car driven by Ms. Kittleson (in which defendant was a passenger):

Q. (By Mr. Jones) Sir, is there anything else about items we have seen today: The scale, the baggies, there were safes, two safes that were found, and the firearm, anything else about that that you can tell the jury that might be significant?

A. Well, other than everything that is sitting right there is common trade craft of a narcotics dealer. A lock box, backpack, a bag. 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.

3/1/19 VRP 326. *See also* 1/7/19 VRP 319-321.

Defendant's theory of the case was that Ms. Kittleson—not defendant—was trying to sell the drugs contained in the Blazer. In his

²³ The Supreme Court based its harmless evidentiary error conclusion on the following statement: "Thomas has not made a convincing argument that Anthony's comment was so prejudicial that, within reasonable probabilities, the outcome of his trial would have been different had Anthony not been allowed to answer the State's question." *State v. Thomas*, 150 Wn.2d at 871.

closing argument, defense counsel stated: “And we heard her testify that she placed those safes in the car, that she bought the methamphetamine so she could do a deal before picking up Mr. Ryan and that deal fell through.” 1/9/19 VRP 535. This argument is supported by Ms. Kittleson’s testimony (1/8/19 VRP 454-56) as well as the obvious tools of the drug trade found in the little safe between Ms. Kittleson and defendant.

Detective Hotz’ “intent to distribute” testimony was significant, but in this case it was dwarfed by Ms. Kittleson’s testimony that she really was trying to sell the drugs in the Blazer. This undisputed testimony is further corroborated by the methamphetamine, scales, spoon, and empty baggies found in a safe, in an automobile, containing a person who had just engaged in a hand to hand exchange in a Fred Meyer parking lot.

Detective Hotz testified that residue on the scale found with the methamphetamine “would probably likely be heroin.” 1/7/19 VRP 320. That is further evidence that the little safe between the seats was a drug dealer’s kit, but as discussed *supra* defense counsel presented and argued Ms. Kittleson’s testimony that she was the drug dealer.

Detective Hotz testified to the street value of the drugs in question and that the amount of methamphetamine in this case was “more than a user amount.” 1/7/19 VRP 322. Petitioner does not complain of this noncontroversial testimony on appeal.

The remainder of Detective Hotz' testimony was noncontroversial and related to general testimony about the drug trade was not related to the facts of this case. Detective Hotz testified that it was very common for dealers to carry firearms in close proximity to their persons, and the reasons supporting that opinion. 1/7/19 VRP 323. Detective Hotz presented opinion testimony about hand-to-hand transactions in general. 1/7/19 VRP 324. Detective Hotz testified that dealers will also sell to other dealers. 1/7/19 VRP 325. Detective Hotz also testified that it was not common for "low time drug dealers" to work with another individual, but that it was not "outside the realm of [possibility] that a dealer might need the help of a driver or lookout. 1/7/19 VRP 325.

Given these facts, defendant cannot meet his burden of demonstrating that within reasonable probabilities, the outcome of the trial would have been materially affected had Detective Hotz not testified.

3. Defendant has failed to present manifest constitutional error. Alternatively, any error in Detective Hotz testimony was harmless beyond a reasonable doubt.

The trial court was never apprised of defendant's claim that Detective Hotz rendered an opinion as to defendant's guilt. This Court only considers specific objections raised in the trial court. RAP 2.5(a)(3). Defendant can only raise this objection for the first time on appeal if the error is manifest. *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125

(2007). This strict approach is taken because trial counsel's failure to object to the error deprives the court of the opportunity to prevent or cure the error and avoid a retrial. *State v. Kirkman*, 159 Wn.2d at 935.

Manifest error “requires an explicit or almost explicit witness statement on an ultimate issue of fact.” *State v. Kirkman*, 159 Wn.2d at 936.

Detective Hotz’ opinion is ambiguous, not explicit:

A. Well, other than everything that is sitting right there is common trade craft of a narcotics dealer. A lock box, backpack, a bag. 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) 3/1/19 VRP 326. The last sentence containing the opinion relating to “intent,” taken literally, is nonsense because “narcotics”, “baggies”, and “scales” are not intentions—they are tangible things. The best guess as to Detective Hotz’ meaning is probably that the tangible things, taken together, demonstrated intent to distribute. *Id.* That inference, however, is not “direct,” like the very direct opinions expressed in *State v. Montgomery*, 163 Wn.2d 577, 594, 183 P.3d 267, 275 (2008). Nor is that opinion related to defendant himself. It could relate just as easily to Ms. Kittleson’s intent. Detective Hotz’s opinion contains no “explicit expressions of personal belief” like the opinions expressed in *Montgomery*, 163 Wn.2d at 594.

In *State v. Montgomery*, unambiguous and improper opinions as to defendant's intent to manufacture methamphetamine were admitted at trial, without objection. *State v. Montgomery*, 163 Wn.2d at 587-89. Applying RAP 2.5(a)(3), the Supreme Court did not allow the defendant to raise the constitutional claim for the first time on appeal. *State v. Montgomery*, 163 Wn.2d at 595. The Court related that the RAP 2.5(a)(3) "exception is a narrow one, and we have found constitutional error to be manifest only when the error caused actual prejudice or practical and identifiable consequences."

In coming to this conclusion, the *Montgomery* Court made two points. *Montgomery*, 163 Wn.2d at 595-96. The first point was that the jury was properly instructed, like *State v. Montgomery*, that jurors are the sole judges of the credibility of witnesses and that jurors are not bound by expert opinions. *Montgomery*, 163 Wn.2d at 595-96. The jury was likewise instructed in this case. CP 152, 156. The second point related to the trial court's receptiveness to an ultimate issue objection:

Finally, we note that when Montgomery did object to a question posed to Detective Knechtel, because the question went to the ultimate legal question, the court sustained the objection and the detective did not answer. Had Montgomery raised objections, it seems likely they too would have been sustained and curative instructions given if requested.

Montgomery, 163 Wn.2d at 596. This second point also obtains in this case. Judge Van Doorninck initially granted defendant's motion to preclude Detective Hotz' testimony. 1/2/19 VRP 14. When Judge Van Doorninck decided to allow Detective Hotz' testimony, she did so with qualification: "I think that I will allow Detective Hotz to testify. I would like it to be narrowed, if possible, in terms of sort of what his experience is and sort of what's typical." 1/2/19 VRP 117. The "intent" component of Detective Hotz' opinion testimony was plainly beyond this limitation. 3/1/19 VRP 326. As in *Montgomery*, "had [defendant] raised objections, it seems likely they . . . would have been sustained and curative instructions given if requested." *Montgomery*, 163 Wn.2d at 596.

Detective Hotz' opinion testimony relating to intent was not manifest constitutional error and should not be considered for the first time on appeal. RAP 2.3(a).

Alternatively, should this Court find manifest constitutional error, this Court should find that error to be harmless beyond a reasonable doubt. Detective Hotz' opinion regarding "intent to distribute" did not take into account defendant's behavior—it was based solely upon the items in the automobile (the "common tradecraft of a narcotics dealer"). 1/7/19 VRP 326. In this case, there was no dispute that there was a narcotics dealer in the car. 1/9/19 VRP 535, 1/8/19 VRP 454-56. The point of contention was

the identity of that dealer. Defense counsel argued that Ms. Kittleson was the drug dealer. 1/9/19 VRP 535. The prosecutor argued that defendant and Ms. Kittleson were working together. 1/9/19 VRP 567. Both sides agreed that the methamphetamine was being held for sale—and Detective Hotz’ testimony could establish no more than that. Any error in the admission of Detective Hotz’ intent testimony was harmless beyond a reasonable doubt because it only contributed to “intent to deliver” as an abstract concept (an undisputed issue in this case) — not to a specific person’s intent to deliver.

IV. CONCLUSION

Overwhelming evidence demonstrated that the methamphetamine in the car in this case was possessed by someone with intent to deliver. A rational juror could conclude that defendant was that person based upon his hand to hand exchange with the driver of the SUV in the Fred Meyer parking lot at 7 :00 a.m., and upon his hasty retreat after law enforcement discovered that exchange. Sufficient evidence supports the jury’s verdict that defendant possessed the methamphetamine (in the safe right next to him along with the scale, the empty baggies, and the spoon) with intent to deliver.

When he spotted law enforcement, defendant did not just retreat back to the car containing the drugs he was trying to sell—he also retreated

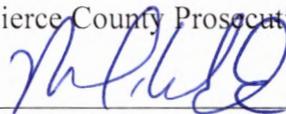
back to the place where a functional firearm, extended magazine, and bullets were located. Sufficient evidence connects defendant to the gun and defendant's crime to the gun. The firearm enhancement in this case is supported by sufficient evidence.

The trial court properly declined to bar Detective Hotz from testifying during defendant's motion in limine. This court should affirm that decision. The other issues relating to Detective Hotz' testimony are evidentiary issues presented for the first time on appeal, and alternatively harmless.

Defendant has not presented manifest constitutional error. Alternatively, if petitioner has presented manifest constitutional error, such error was harmless beyond a reasonable doubt.

RESPECTFULLY SUBMITTED this 22nd day of January, 2020.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Mark von Wahlde WSB# 18373
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

1/22/20 alson
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

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