

FILED

NOV 17, 2016
Court of Appeals
Division III
State of Washington

NO. 33945-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JUSTIN GABRIEL GEBHARDT,

Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

Appellant makes numerous assignments of error. These can be summarized as follows;

Assignments of Error

1. The trial court abused its discretion in admitting trial Exhibit 2 where the State failed to establish a chain of custody.
2. The trial court abused its discretion in admitting trial Exhibit 4 where the State failed to establish a chain of custody.
3. The trial court erred in entering judgment against Mr. Gebhardt for delivery of methamphetamine because the methamphetamine evidence should have been suppressed for failure to establish an adequate chain of custody.
4. The trial court erred in entering judgment against Mr. Gebhardt for possession of methamphetamine because the methamphetamine evidence should have been suppressed for failure to establish an adequate chain of custody.

Response to Assignment of Errors.

1. Gebhardt did not object at the time of trial this alleged error has not been preserved and there is no basis for this court consider it for the first time on appeal.
2. The State presented a sufficient chain of custody to allow the admission of the three baggies of methamphetamine.

II. STATEMENT OF THE CASE

The substantive and procedural facts have been adequately set forth in Appellant's brief therefore, pursuant to RAP 10.3(b); the State shall not set forth a separate facts section in this brief. The State shall refer to the record in the body of this brief as needed.

III. ARGUMENT.

The record clearly reflects that Appellant made no objection to the admission of these two exhibits, consisting of three small baggies of white powder that was recovered after a “controlled buy” of methamphetamine conducted by the officers who testified at this trial and a confidential informant and the other was seized from Appellant’s garage apartment where it was photographed, lying on a table. RP 108-110 The testimony just before these baggies were admitted was from the Washington State Patrol Crime Lab analyst who conducted tests on the substances and determined that all three packages contained methamphetamine. RP 243-5 These photographs, which were also not objected to by Appellant, were admitted at trial and show the packaged methamphetamine up close and in the room where Appellant was living. RP 320 (The portions of the VRP addressing exhibits 2 and 4 are contained in Appendix A.)

Appellant never moved to suppress any of the evidence that was found in the garage. Trial counsel did object to the admission of certain items that were found in the garage for lack of foundation, the court agreed regarding one item, a meth pipe that was shown to have been found and seized however not officer could establish that they had observed that item in that location and taken the photographs of that item. RP 132-4, 137-140 Clearly the actions of trial counsel in not objecting to the

admission of the methamphetamine indicates that Gebhardt was truly had no basis to object and or that this simple method of allowing negated the State's ability to put on further information that makes the State's case appear even more solid to the jury.

Appellant does not explain to this court the legal basis that would allow him to raise this issue for the first time on appeal. RAP 2.5(a) provides that this court "may refuse to review any claim of error which was not raised in the trial court." State v. Kirwin, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009):

Although not raised at trial, Kirwin may submit for review a "manifest error affecting a constitutional right." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (quoting RAP 2.5(a)(3)). Kirwin must "identify a constitutional error and show how, in the context of the trial, the alleged error actually affected [his] rights." *Id.* (citing State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). It is proper to "preview" the merits of the constitutional argument to determine whether it is likely to succeed. State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (citing State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

To overcome RAP 2.5(a) and raise an error for the first time on appeal, an appellant must first demonstrate the error is "truly of constitutional dimension." State v. O'Hara, 167 Wn.2d 91, 98-99, 217 P.3d 756 (2009). This Court will not assume an error is of constitutional magnitude. *Id.* at 98. Rather Appellant must identify the constitutional

error. *Id.* (citing State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007)). Even if a claimed error is of constitutional magnitude, an appellate court must then determine whether the error was manifest. *Id.* at 99. "Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice." ... "To demonstrate actual prejudice there must be a plausible showing by the [appellant] that the asserted error had practical and identifiable consequences in the trial of the case."

Gebhardt now comes before this court and argues that he should be allowed to have the chain of custody for two exhibits considered by this court for the first time on appeal. As the record reflects there was never an objection and in fact trial counsel for Gebhardt did not object to the admission of these items. As stated in State v. McFarland, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995):

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be "manifest" - i.e., it must be "truly of constitutional magnitude". Scott, 110 Wn.2d at 688. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is this showing of actual prejudice that makes the error "manifest", allowing appellate review. Scott, 110 Wn.2d at 688; Lynn, 67 Wn. App. at 346. *If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the*

error is not manifest. State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

...

It is not enough that the Defendant allege prejudice - actual prejudice must appear in the record. In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3). (Footnote omitted, emphasis mine.)

State v. Nguyen, 165 Wn.2d 428, 433, 197 P.3d 673 (2008):

In general, an error raised for the first time on appeal will not be reviewed. State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An exception exists for a "manifest error affecting a constitutional right." RAP 2.5(a)(3). This is a "narrow" exception. Kirkman, 159 Wn.2d at 934, 155 P.3d 125 (quoting State v. Scott, 110 Wn.2d 682, 687, 757 P.2d 492 (1988)). A "manifest" error is an error that is "unmistakable, evident or indisputable." State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992). An error is manifest if it results in actual prejudice to the defendant or the defendant makes a "plausible showing" "that the asserted error had practical and identifiable consequences in the trial of the case." State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999) (quoting Lynn, 67 Wn.App. at 345, 835 P.2d 251). "The court previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed." State v. Walsh, 143 Wn.2d 1, 8, 17 P.3d 591 (2001) (citing WWJ Corp., 138 Wn.2d at 603, 980 P.2d 1257).

Appellant has not claimed that counsel's conduct was deficient and that the deficient performance resulted in prejudice and in order to establish that counsel was ineffective. He would have to meet the test set forth adopting in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct.

2052, 80 L. Ed. 2d 674 (1984)). To show deficient representation, Appellant must show that counsel's performance fell below an objective standard of reasonableness based on all of the circumstances. Nichols, 161 Wn.2d 1, 162 P.3d 1122 (2007), (citing State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Prejudice is established if there is a reasonable probability that, but for counsel's unprofessional errors, the trial outcome would have been different. Nichols, 161 Wn.2d at 8.

RAP 2.5(a)(3) requires that a defendant raising a constitutional error for the first time on appeal show how the alleged error actually affected his rights at trial. State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). This court will employ a two-part analysis to determine whether an asserted error is a manifest error affecting a constitutional right. See State v. Holzkecht, 157 Wn.App. 754, 760, 238 P.3d 1233 (2010), review denied, 170 Wn.2d 1029, 249 P.3d 623 (2011).

First, this court will determine whether the error is truly constitutional, as opposed to another form of trial error. Holzkecht, 157 Wn.App. at 759-60.

Second, this court will decide whether the error is manifest. Holzkecht, 157 Wn.App. at 760 "Manifest" error requires a defendant to demonstrate actual prejudice. Holzkecht, 157 Wn.App. at 760. Actual

prejudice arises if the asserted error had practical and identifiable consequences at trial. State v. O'Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting Kirkman, 159 Wn.2d at 935).

To decide the actual prejudice prong, this court will examine the record to determine if it is sufficiently developed to decide the merits of the claim. Manifest errors affecting constitutional rights are subject to harmless error analysis." A constitutional error is harmless if this court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. Holzknrecht, 157 Wn.App. at 760.

Gebhardt has not even addressed RAP 2.5. He has therefore obviously not indicated to this court a valid basis to allow this issue to be raised for the first time on appeal under RAP 2.5. The finding of the court in State v. Trout, 125 Wn. App. 313, 317, 103 P.3d 1278 (2005) are applicable herein, "This exception is not intended to swallow the rule, so that all asserted constitutional errors may be raised for the first time on appeal. Indeed, criminal law has become so largely constitutionalized that any error can easily be phrased in constitutional terms."

Even if this court were to determine there was some sort of error here it is invited error. As was set forth in State v. Barnett, 104 Wn.App. 191, 200, 16 P.3d 74 (Div. 3 2001) "The doctrine of invited error

precludes review of Mr. Barnett's assigned error. The doctrine of invited error prevents a party from setting up an error at trial and then complaining of it on appeal. A potential error is deemed waived "if the party asserting such error materially contributed thereto." (Citations omitted.)

The courts of this State have indicated that this type of error must be something that the defendant brought upon himself, In re Personal Restraint of Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000) "In these invited error doctrine cases, the defendant took knowing and voluntary actions to set up the error; where the defendant's actions were not voluntary, the court did not apply the doctrine." The record makes it clear that Gonzalez wanted this testimony, that he wanted his chance to examine these hearsay witnesses.

This was a trial tactic, State v. Manthie, 39 Wn. App. 815, 825, 696 P.2d 33 (1985) "...the defense allowed the admission of this evidence as a trial tactic tending to divert the blame to Rose for the murder. We find no error here. As to Rose's testimony, the error, if any, is self-invited and is not subject to appellate review, even if a constitutional right is involved."

As was so aptly stated in State v. Craig, 82 Wn.2d 777, 786, 514 P.2d 151 (Wash. 1973) "At the trial, the appellant stipulated that his blood

type was Group B. It is not claimed that the stipulation was coerced.

Where a party participates in the introduction of evidence and does not object, he cannot complain later of its admission. State v. Benson, 58 Wn.2d 490, 364 P.2d 220 (1961).”

State v. Barnett, 104 Wn.App. 191, 200, 16 P.3d 74 (Div. 3 2001)

“The doctrine of invited error precludes review of Mr. Barnett's assigned error. The doctrine of invited error prevents a party from setting up an error at trial and then complaining of it on appeal. A potential error is deemed waived "if the party asserting such error materially contributed thereto.” (Citations omitted.)

Gebhardt should not be allowed to agree to the admission of these exhibits in the trial court while objecting to others and now on appeal attempt to have this court determine the chain of custody was insufficient at trial and therefore all charges should be dropped. This exactly why the courts have stated over and over that matters must be raised in the trial court so that all parties may address the issue and there is an actual ruling and a record of that ruling for this court to review. That was not done here, this court should decline to review this allegation.

CHAIN OF CUSTODY - ALLEGATIONS “a” and “b.”

Throughout this brief the State has set forth the extensive facts testified to during this trial that support the chain of custody for exhibits 2

and 4. The State firmly believes that because the admission of these two exhibits was not objected to in the trial court this issue was not preserved. However, if this court were to consider this issue the law is clear that the facts presented through the testimony at trial were sufficient to prove the chain of custody for exhibits 2 and 4.

The State showed the chain of custody of these drugs. It was not required to call everyone who touched this evidence. State v. Lui, 153 Wn.App. 304, 318-319, 221 P.3d 948 (2009), review granted, 168 Wn.2d 1018 (2010); State v. Roche, 114 Wn.App. 424, 436, 59 P.3d 682 (2002). The drug evidence simply had to be "satisfactorily identified and shown to be in substantially the same condition as when the crime was committed." Roche, 114 Wn.App. at 436. The State does not need to eliminate every possibility of potential contamination nor identify the object with absolute certainty. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094 (1985). Here, the State identified the drugs and showed that they were in substantially the same condition as when the crime was committed.

A challenge such as this, if it is accepted is a challenge of the State's burden of persuasion; that is the weight the jury should have given to the drug evidence, not the admissibility or sufficiency of that drug evidence. State v. Roy, 126 Wn.App. 124, 130, 107 P.3d 750 (2005);

A court has broad discretion in admitting physical objects; we review for an abuse of discretion. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984). The object need not be identified with absolute certainty. *Id.* As long as the sample was determined to be in substantially the same condition, despite the absence of Mr. Roy's initials, chain of custody objections go to the weight of the evidence, not its admissibility. *Id.* Considering the long list of detailed steps taken by Mr. Vogler, the trial court did not abuse its discretion in admitting the urinalysis sample.

Federal law addresses this issue as follows in Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009);

The confrontation clause does not demand the live testimony of " anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device" Melendez-Diaz, 557 U.S. at 311 n.1. In other words, while a break in the chain of custody might detract from the credibility of an expert analysis of some piece of evidence, this break in the chain does not violate the confrontation clause. *Id.*

Ultimately, the State was not required to rule out every hypothetical scenario on this chain of custody to prove its case. State v. Gosby, 85 Wn.2d 758, 765, 539 P.2d 680 (1975).

If this court accepts review of this allegation the facts set forth in the Appendix and in the body of this brief clearly indicate that there was sufficient testimony to prove the chain of custody.

SUFFICIENCY OF THE EVIDENCE.

As was stated in Colquitt at 796;

...sufficiency may be raised for the first time on

appeal. RAP 2.5(a)(3); ("Due process requires the State to prove its case beyond a reasonable doubt; thus, sufficiency of the evidence is a question of constitutional magnitude and can be raised initially on appeal.") ...

Due process requires the State to prove beyond a reasonable doubt all the necessary facts of the crime charged. Evidence is sufficient to support a conviction when, viewed in the light most favorable to the State, any rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. In a sufficiency of the evidence claim, the defendant admits the truth of the State's evidence and all inferences that reasonably can be drawn from that evidence. Nevertheless, the existence of a fact cannot rest upon guess, speculation, or conjecture. (Citations omitted.)

Even if this court were to determine that the chain of custody from the officer to the WSP Crime Lab and back was not sufficient this court has ruled previously that exhibits such as these two would, without the final chemical analysis done at the laboratory, be sufficient to support a conviction.

The issue is whether sufficient evidence would support Gephardt's convictions. Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). "[W]hen the sufficiency of the evidence is challenged in a criminal case, all reasonable inferences from the evidence must be drawn in favor

of the State and interpreted most strongly against the defendant." State v. Partin, 88 Wn.2d 899, 906-07, 567 P.2d 1136 (1977).

In order to convict Gebhardt of possession of a controlled substance and deliver of a controlled substance the trier of fact must find the defendant delivered a controlled substance on one date and simply possessed it on another date. RCW 69.50.401(1). Even if there had been no sample taken or presumptive testing done his convictions could still stand.

This court has ruled that "[g]enerally, a chemical test is not vital to uphold a conviction for possession of a controlled substance." State v. Colquitt, 133 Wn.App. 789, 796, 137 P.3d 892 (2006). "Circumstantial evidence and lay testimony may be sufficient to establish the identity of a drug in a criminal case." State v. Hernandez, 85 Wn.App. 672, 675-76, 935 P.2d 623 (1997).

In Colquitt, the sole controlled substance evidence was "a statement that the officer thought the substance appeared to be cocaine and that the substance tested positive in a field test for cocaine." Colquitt, 133 Wn.App. at 794. The court found this evidence insufficient to support the conviction. Id. However, the court reasoned, "circumstantial evidence may be sufficient [to establish the identity of a controlled substance]." Id. at 800. The court observed that proper evidence of an officer's experience

and training "would allow him to properly identify the items as cocaine." Id. at 801. The Colquitt court recognized, "[c]ircumstantial evidence must prove the identity of the substance beyond a reasonable doubt." Id. The court provided a non-exhaustive list of factors to aid in determining whether the State has met this burden:

(1) [T]estimony by witnesses who have a significant amount of experience with the drug in question, so that their identification of the drug as the same as the drug in their past experience is highly credible; (2) corroborating testimony by officers or other experts as to the identification of the substance; (3) references made to the drug by the defendant and others, either by the drug's name or a slang term commonly used to connote the drug; (4) prior involvement by the defendant in drug trafficking; (5) behavior characteristic of use or possession of the particular controlled substance; and (6) sensory identification of the substance if the substance is sufficiently unique. Id. (citing *State v. Watson*, 231 Neb. 507, 514-17, 437 N.W.2d 142 (1989)).

Here, Det. Horbatko testified extensively about his years and years of experience with methamphetamine, to include the training that he had attended where he was allowed to actually make methamphetamine. RP 88-9 He described the substances that he was given by the CI.

The testimony regarding the transaction at the hotel was extensive. Task Force Detective Eric Horbatko heard an individual named, Anita Ballesteros selling drugs and at the time of this action Ballesteros was out of drugs and would have to order more. RP 100. Mr. France was tasked with purchasing methamphetamine from Ballesteros who was staying in

Econo Lodge room 216. RP 102, 192-93. As part of the normal procedure when using the service of a CI Detective Horbatko searched him to insure the he had no other money or drugs. Mr. France was then given a specific amount of money, \$100.00 in “recorded buy money.” Mr. France was under surveillance the entire time he was going to or coming from hotel room 216. RP 102-03, 176.

Mr. France was in room 216 for about 30 minutes when another man, Walt, was observed to entered the room. RP 105, 193. Walt stayed in the room for 17 minutes. RP 107. Walt left the room after receiving a text. RP 193-94. Walt walked to a yellow pickup sitting in an adjacent parking lot with its motor running. RP 177-78. Walt got into the passenger side and stayed for about 30 seconds before getting out with a ball of white substance in plastic in his hand. RP 180. Walt walked back to room 216 and went inside. RP 180. Mr. France testified that Walt had methamphetamine. RP 193. Mr. France paid Ballesteros for a portion of the methamphetamine, he then exited room 216. RP 194-95.

Mr. France recontacted Detective Horbatko and turned over to the detective two one-inch clear plastic Ziploc baggies containing a crystal substance. RP 108, 195.

DEA Special Agent Joshua Gravel’s was conducting surveillance from a location within the parking lot of the hotel. His

physical location was within 10 feet of the yellow pickup. RP 178. Agent Gravel was able to see that the pickup was occupied only by a male driver. RP 178-79. This pickup left the parking lot just after Walt exited the truck. RP 180. Agent Gravel testified that based on his training and experience what he observed occurring in the pickup appeared to be a drug deal. His testimony included a very specific description of an item that was in Walt's had when he left the truck. Agent Gravel testified that "[i]t looked like a ball, plastic substance with white, clear,..." RP 179-80.

WSP officer Gary Wilcox followed the yellow truck. RP 187. It stopped briefly in a McDonald's parking lot. RP 188. A woman from a nearby car got into the passenger side of the pickup. The pickup drove for a block, dropped the woman in another parking lot, and drove away leaving her there. RP 189, 232-33. Detective Wilcox testified that too looked like a drug deal. RP 233.

Department of Licensing (DOL) records showed Justin Gebhardt as the pickup's registered owner. RP 111. Agent Gravel identified Gebhardt as the pickup's driver after viewing a DOL photo of him. RP 112, 181. Detective Horbatko field tested and weighed the baggies given to him by France. RP 108-09. During trial, he identified Exhibit 2 as the two baggies. RP 108-09.

Det. Horbatko also testified regarding the substance which was seized from Gephardt's "residence" and the fact that he had "field tested" that substance. RP 44, 67, 109, 271. Based on the cases cited above this alone would suffice to prove that the substance was methamphetamine.

The State's evidence did not stop there though. The State called a forensic scientist Jason Stenzel who testified that the substances that he tested were methamphetamine. Mr. Stenzel testified that the items that he was looking at were in fact those which he had tested in the laboratory. It was at this time that the reports that he generated were also placed in to evidence, exhibits 21 and 22. Once again based on Colquitt these reports would suffice as proof that exhibits 2 and 4 were methamphetamine. (RP 241-45)

The state supplied sufficient evidence to support the underlying charges, the methamphetamine that was tested, identified and admitted, without objection, in conjunction with the testimony regarding the actual deliver and the possession at Gephardt's residence was proof beyond a reasonable doubt of the charges.

IV. CONCLUSION

The actions of the trial court should be upheld this appeal should be dismissed.

Respectfully submitted this 17th day of November 2016,

s/David B. Trefry

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APPENDIX A

Q Okay. And did you pick up the confidential source.

A Immediately.

Q Okay. And -- did the confidential source hand you anything.

A Yes.

Q And what did they -- the confidential source hand you.

A Two -- approximately one by one inch small Ziploc baggies containing crystalline substance.

Q Through your training and experience did you recognize that substance?

A Yes. As methamphetamine.

Q I'm showing you what has been marked as State's Identification 2. Do you recognize this.

A Yes.

Q How do you recognize it?

A This is the two Ziploc baggies -- with crystalline substance inside and it actually has a skull pattern on it.

Q And, how do you recognize it?

HORBATKO, ERIC - Direct 108

A This is the -- this is the -- stuff that the confidential source handed me.

Q Okay. Are there any markings on that -- packaging?

A The outer packaging or inner?

Q Yes.

A It's--.

Q Did you package that.

A Yes.

Q Okay.

A As evidence.

Q All right.

And on the scene did you -- did you weigh the -- the methamphetamine baggies?

A Not at the scene, no.

Q Did you later weigh the methamphetamine--

A Later weighed and field-tested it, yes.

Q Okay. How much did they weigh?

A Each -- each parcel was approximately 1.7 grams. And they field-tested positive for methamphetamine.

Q How many doses -- Through your training and experience in -- in narcotics, and particularly methamphetamine, approximately how many doses is in that amount of methamphetamine?

A Two of those parcels is -- basically 3.5 grams, which is -- one eighth of an ounce. On the street it's called an

HORBATKO, ERIC - Direct 109

eight ball. An eight ball is -- it's usually five to ten doses per gram, so that would be 15 to -- Well, it would be like 18 to 36 doses of methamphetamine in one eighth of an ounce.

Q Okay. And how much does a eight ball cost?

A Price fluctuates somewhat. It's been pretty constant for the past year. Like during this. But between -- \$75 and \$100.

Q Okay.

Now did you -- did you search the CS after he handed

over the suspected methamphetamine?

A Yes.

Q Okay. And did you find anything?

A No.

RP 110

...

Q All right, Detective, you can go ahead and put that back in. Now, Detective, I'm showing you what has been marked as State's Identification No. 4. Do you recognize that.

A I do.

Q And how do you recognize it.

A This is the bag that was found on the table upon entry.

Q All right. And is that the suspected methamphetamine?

A Yes.

Q Okay. And is that the tape's -- did you package that?

A I did not.

Q Who packaged that?

A Det. Garcia.

Q Okay.

A He sealed it.

Q All right.

A And then the blue tape here, I'm sure the lab will testify,

HORBATKO, ERIC - Direct (cont'd) 126

but it's -- the laboratory--

Q All right.

A --tape.

Q But that's the methamphetamine that you found in the house--

A Yes.

Q --on the table?

A Yes.

Q All right. And so are those the reports that you wrote concerning the methamphetamine in State's Identification -- or the possible methamphetamine--

A Yes.

RP 127

Mr. Richard France

Q Okay. And did Walt have methamphetamine.

A Yes.

Q Okay. And -- when he came back what happened? Explain to the jury what happened.

A He came in, he gave Anita the bag. She in turn cut out -- weighed out what I was after, and I got mine and I left.

Q Okay. Did you pay her?

A Yes, I did.

Q Okay. And when you left, did you get into contact with Det. Horbatko?

A Yes, I did.--

Q Okay.

A I went straight back across the street over to where I'd been dropped off and got back in the vehicle.

Q Okay. And did you hand over the methamphetamine--

A Yes--

Q --that you purchased?

A Yes, I did.

Q Okay. And did you tell him what had happened in the -- the motel room?

A Yes, I did.

Q Okay. And when were you searched after you handed over the methamphetamine?

A Yes, I was.

Q Okay.

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...

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Q --in -- in State's -- State's identification 2 and 4?

A Yes.

Q Okay.

MR. CAMP: The state offers State's Identification -- I always et my numbers mixed up -- 21 and 22.

MR. COTTERELL: No objection.

THE COURT: 21 and 22 will be admitted.

Q Now if you could for the jury read your findings for -- for each of your reports and -- and if you could, indicate which other identification is involved.

A For State Identification 4, -- report State Identification 21 reads, "Item 002 was a tape sealed Ziploc plastic bag that heled a Ziploc plastic bag that held 1.6 grams net weight of white crystalline material. The material was analyzed. It was found to contain methamphetamine hydrochloride."

Q All right.

MR. CAMP: State offers State's Identification -- 4.

MR. COTTERELL: No -- no objection.

THE COURT: 4 will be admitted.

Q And if you could do the same for your second report, please.

A Results and conclusions. The material in each of the bags in Item 010 was found to contain methamphetamine hydrochloride. Evidence Item 010 was a tape sealed Ziploc

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bag that held two Ziploc bags each with white crystalline material. The material in each bag was analyzed. The net weights were found to be 1.5 grams and 1.5 grams. The methods and observations that I used, Fourier Transform Infrared Spectroscopy (FTIR) and microcrystalline test.

MR. CAMP: The state at this time would offer State's Identification 2.

MR. COTTERELL: No objection.

THE COURT: 2 will be admitted.

MR. CAMP: The state at this time would offer State's Identification 2.

MR. COTTERELL: No objection.

THE COURT: 2 will be admitted.

MR. CAMP: Your Honor, at this time the state would like to publish to the jury State's Identification -- or State -- now State's Exhibit 2 and State's Exhibit 4.

THE COURT: Your position, Mr. Cotterell?

MR. COTTERELL: Well, I don't -- I don't know if the prosecution is going to hand that to the jury, or -- or how

do you want to do that? Just show--? Okay.

THE COURT: All right.

So there's no objection, then, Mr.--

MR. COTTERELL: No.

THE COURT: --Cotterell?

All right.

You may publish the substances to the jury.

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AMENDED DECLARATION OF SERVICE

I, David B. Trefry, state that on November 17, 2016, I emailed a copy, by agreement of the parties, of the Respondent's Brief to: Lisa Tabbut at Lisa Tabbut Itabbutlaw@gmail.com

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 17th day of November, Spokane, Washington.

s/ David B. Trefry
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