FILED
Court of Appeals
Division III
State of Washington
9/17/2018 3:52 PM

NO. 35805-4-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

BLAKE ANDREW ZAHN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR OKANOGAN COUNTY

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. INTRODUCTION 1

B. ASSIGNMENTS OF ERROR 2

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR 3

D. STATEMENT OF THE CASE 5

E. ARGUMENT 12

1. The court erred in forcing Mr. Zahn to proceed pro se in the absence of an unequivocal request to do so and without ensuring Mr. Zahn knowingly and intelligently waived his right to counsel, requiring reversal and a new trial. 12

a. Courts may not permit individuals to relinquish their constitutional rights to counsel without an unequivocal request from the defendant and a knowing and voluntary waiver. 12

b. Mr. Zahn made no unequivocal request to proceed pro se. 13

i. Courts must evaluate the context of statements to determine if a defendant made an unequivocal request to proceed pro se. 13

ii. Mr. Zahn's one sentence comment expressed frustration, not an unequivocal request to proceed pro se. 14

iii. Mr. Zahn's later acquiescence was not an unequivocal request to proceed pro se..... 16

c. The court failed to ensure that Mr. Zahn knowingly and voluntarily waived his constitutional right to counsel. 18

i. The court must conduct an adequate inquiry to ensure the individual is knowingly and voluntarily waiving their constitutional right to counsel. 18

ii. The court initially forced Mr. Zahn to proceed pro se without conducting any inquiry whatsoever. 20

iii. The court's eventual colloquy failed to adequately determine that Mr. Zahn knowingly and voluntarily waived his right to counsel. 21

d. The court erred in forcing Mr. Zahn to proceed pro se; therefore, reversal is required. 23

2. The State's comments encouraged the jury to draw negative inferences from Mr. Zahn's exercise of his right to remain silent. 24

a. The right against self-incrimination includes a right to silence... 24

b. The State violates a person's constitutional rights when it comments on a person's invocation of his right to silence. 25

c. The prosecutor's opening statement and Sergeant Arnold's testimony both commented on Mr. Zahn's invocation of his right to remain silent in violation of his right against self-incrimination. 27

d. This constitutional error requires reversal. 29

3. The court impermissibly told the jury Mr. Zahn had "actual drugs" in his possession, which relieved the State of its burden to prove this essential element beyond a reasonable doubt. 30

a. The Washington Constitution prohibits judges from commenting on the evidence 30

b. The court's reference to the exhibits as "drugs," "actual drugs," "contraband," and "harmful substances" impermissibly conveyed to the jury that the court believed the exhibits to be controlled substances. 32

c. Prejudice is presumed from these impermissible comments and reversal is required. 34

4. The court failed to conduct the required individualized inquiry into Mr. Zahn's present and future ability to pay before imposing LFOs, requiring reversal of the imposition of the discretionary LFOs. 37

a. The statute prohibits courts from imposing discretionary LFOs except where an individualized inquiry affirmatively demonstrates a person has a present or future ability to pay such obligations. 37

b. The court failed to conduct an adequate individualized inquiry.. 39

c. This Court should strike the imposition of the discretionary LFOs. 42

F. CONCLUSION 43

TABLE OF AUTHORITIES

Cases

Balandzich v. Demeroto, 10 Wn. App. 718, 519 P.2d 994 (1974) 33

Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)..... 26, 29

City of Bellevue v. Acrey, 103 Wn.2d 203, 691 P.2d 957 (1984) 20

Douglas v. Cupp, 578 F.2d 266 (9th Cir. 1978) 26

Doyle v. Ohio, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976)..... 25

Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975)..... 12

Heitfeld v. Benevolent Protective Order of Keglers, 36 Wn.2d 685, 220 P.2d 655 (1950)..... 30

In re Detention of Turay, 139 Wn.2d 379, 986 P.2d 790 (1999)..... 14

Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L. Ed. 1461 (1936) 19

Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966)..... passim

State v. Becker, 132 Wn.2d 54, 935 P.2d 1321 (1997)..... 30

State v. Blazina, 182 Wn.2d 827, 344 P.3d 680 (2015)..... 37, 38, 39

State v. Bogner, 62 Wn.2d 247, 382 P.2d 254 (1963) 31, 35, 36

State v. Burke, 163 Wn.2d 204, 181 P.3d 1 (2008)..... 24, 27

State v. Christopher, 185 Wn.2d 1001, 369 P.3d 149 (2016)..... 37

State v. Como, 185 Wn.2d 1025, 377 P.3d 730 (2016)..... 38

State v. Curry, __ Wn.2d __, 423 P.3d 179 (2018)..... passim

State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002) 25, 26, 28

State v. DeWeese, 117 Wn.2d 369, 816 P.2d 1 (1991) 19, 21

State v. Easter, 130 Wn.2d 228, 922 P.2d 1285 (1996)..... 25, 29

State v. Embry, 171 Wn. App. 714, 287 P.3d 648 (2012)..... 28

State v. Fritz, 21 Wn. App. 354, 585 P.2d 173 (1978) 13, 17

State v. Gamble, 168 Wn.2d 161, 225 P.3d 973 (2010) 31

State v. Glover, __ Wn. App. 2d __, 423 P.3d 290 (2018) 42

State v. Gonzalez, 2 Wn. App. 2d 96, 408 P.3d 743 (2018) 32

State v. Holmes, 122 Wn. App. 438, 93 P.3d 212 (2004) 29

State v. Jackman, 156 Wn.2d 736, 132 P.3d 136 (2006)..... 32, 35, 36

State v. Lampshire, 74 Wn.2d 888, 447 P.2d 727 (1969)..... 30, 31, 34

State v. Levy, 156 Wn.2d 709, 132 P.3d 1076 (2006)..... 30

State v. Lewis, 130 Wn.2d 700, 927 P.2d 235 (1996)..... 25

State v. Luvene, 127 Wn.2d 690, 903 P.2d 690 (1995)..... 14

State v. Madsen, 168 Wn.2d 496, 229 P.3d 714 (2010) 17

State v. Malone, 193 Wn. App. 762, 376 P.3d 443 (2016) 39

State v. Perrett, 86 Wn. App. 312, 936 P.2d 426 (1997)..... 26, 29

State v. Ralston, 185 Wn.2d 1025, 377 P.3d 724 (2016)..... 38

State v. Ramirez, 1 Wn. App. 2d 1001 (2017) (not reported), *review granted by* 190 Wn.2d 1001 (2018)..... 38

State v. Romero, 113 Wn. App. 779, 54 P.3d 1255 (2002)..... 25, 26, 28, 29

State v. Silva, 108 Wn. App. 536, 31 P.3d 729 (2001) 19, 21, 23

State v. Sweet, 138 Wn.2d 466, 980 P.2d 1223 (1999)..... 28

State v. Woods, 143 Wn.2d 561, 23 P.3d 1046 (2001) 14

Statutes

RCW 10.01.160 ..... 4, 37

RCW 69.50.4013 32

Other Authorities

Const. art. I, § 9..... 2, 3, 24

Const. art. I, § 22..... 2, 3, 12

Const. art. IV, § 16..... passim

U.S. Const. amend. 5 ..... 2, 3, 24

U.S. Const. amend. 6 ..... 2, 3, 12

U.S. Const. amend. 14 ..... 2, 3, 12

Rules

RAP 2.5..... 38

A. INTRODUCTION

When Blake Zahn appeared in court for the first time and expressed frustration with his lawyer, the court deemed him pro se without any inquiry or discussion. After weeks of representing himself and again without a request to proceed pro se, the court finally questioned Mr. Zahn about his knowledge of his charges, possible sentence, and procedural matters. Mr. Zahn relented and agreed to continue to represent himself.

The State took advantage of Mr. Zahn's pro se status at trial, twice commenting impermissibly on Mr. Zahn's invocation of his right to silence. In addition, immediately before deliberations began, the court impermissibly commented on the evidence by informing the jury that the substance at issue was "actual drugs."

Mr. Zahn was denied his right to counsel and rights to a fair trial and due process, and this Court should reverse his conviction and remand for a retrial.

B. ASSIGNMENTS OF ERROR

1. The court erred in forcing Mr. Zahn to proceed pro se in the absence of an unequivocal request from Mr. Zahn to do so, in violation of Article I, Section 22 of the Washington Constitution and the Sixth and Fourteenth Amendments of the United States Constitution.

2. The court erred in forcing Mr. Zahn to proceed pro se without conducting a full colloquy into whether he was knowingly and voluntarily waiving his constitutional right to counsel, in violation of Article I, Section 22 of the Washington Constitution and the Sixth and Fourteenth Amendments of the United States Constitution.

3. The court erred in permitting a statement from the prosecutor and in admitting testimony from a police witness that impermissibly commented on Mr. Zahn's right to remain silent, in violation of the Fifth Amendment to the United States Constitution and Article I, Section 9 of the Washington Constitution, and in violation of his right to a fair trial and due process under the Fourteenth Amendment.

4. The court erred in impermissibly commenting on the evidence, in violation of Article IV, Section 16 of the Washington Constitution, by referring to the exhibits in question as "drugs," "actual drugs," "contraband," and "harmful substances."

5. The court erred when it imposed discretionary legal financial obligations (LFOs) but failed to conduct an adequate individualized inquiry into Mr. Zahn's present and future ability to pay.

C. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Individuals charged with crimes have a constitutional right to counsel. Const. art. I, § 22; U.S. Const. amends. 6, 14. Courts must apply a strong presumption against the waiver of this important constitutional right and may permit an individual to represent himself only where he makes an unequivocal request to proceed pro se and where the court has determined the person is knowingly and intelligently waiving their right to counsel. Here, the court relieved appointed counsel and declared Mr. Zahn was representing himself at the first court appearance after a comment of frustration from Mr. Zahn. Mr. Zahn made no unequivocal request and the court conducted no inquiry into whether he was knowingly and intelligently waiving his right to counsel. Did the court err in forcing Mr. Zahn to proceed pro se, violating his constitutional rights to counsel and due process and requiring reversal?

2. The Fifth Amendment and Article I, Section 9 encompass a right to remain silent which individuals may invoke at any time. Here, the prosecutor stated in his opening statement and a police witness testified that Mr. Zahn invoked his right to silence while being questioned after he

received *Miranda* warnings. Did the comment and testimony on Mr. Zahn's right to remain silent violate Mr. Zahn's constitutional right against self-crimination and his right to due process, requiring reversal of his conviction?

3. Article IV, Section 16 prohibits courts from commenting on the evidence. Here the court made statements to and in front of the jury in which it referred to the exhibits at issue as "drugs," "actual drugs," "contraband," and "harmful substances." Did the court's comments relieve the State of their burden of proving beyond a reasonable doubt that the exhibits at issue were in fact a controlled substance, which was an essential element of the charged offense, such that they were an impermissible comment on the evidence in violation of Article IV, Section 16, requiring reversal?

4. RCW 10.01.160 and Washington Supreme Court precedent prohibit courts from imposing discretionary LFOs unless an individualized inquiry affirmatively establishes an individual possesses the present and future ability to pay. Here the court asked only two cursory questions before imposing all discretionary costs and a payment schedule. Should this Court strike imposition of the LFOs where the court failed to conduct an adequate inquiry under the statute and Supreme Court binding precedent?

D. STATEMENT OF THE CASE

The arrest:

Following a stop for a traffic infraction, Mr. Zahn was arrested for driving with a suspended license. CP 18, 41. While detained in jail on the driving matter, officers discovered heroin on his person and in his property. RP 175-78, 181-84. Sergeant Arnold read Mr. Zahn his Miranda rights and asked him whether he brought the heroin into jail with him or acquired it while in jail. RP 142-43. Mr. Zahn responded that he brought it in and then told Sergeant Arnold he did not want to talk to him anymore. RP 143.

Mr. Zahn was subsequently charged with possession of a controlled substance other than marijuana.[1] CP 59-60.

First court appearance: October 9, 2017:

On October 9, 2017, the court date originally set for arraignment, stand-in defense counsel[2] informed the court that Mr. Zahn "wishes to represent himself." RP 5. Mr. Zahn stated, "I just don't feel that I can fully trust um my attorney and um I would like to represent myself in this

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[1] The charges related to the initial traffic stop are not the subjection of this case. Those charges resulted in a complaint in Douglas County. CP 18. While the initial traffic stop occurred in Douglas County, Okanogan County jail houses individuals arrested in Douglas County, and the heroin that is the subject of this case was discovered while Mr. Zahn was held in Okanogan County jail. R 130-32.

[2] Jason Wargin was the assigned defense counsel. An unidentified defense attorney standing in for Mr. Wargin appeared at the October 9, 2017, court date on his behalf. RP 5.

matter." RP 6. The court made no inquiry of Mr. Zahn regarding self-representation at any time during the court appearance. RP 5-8. The entirety of the questions the court asked Mr. Zahn were: (1) "Okay, Mr. Zahn, tell me, what's going on?" RP 6; (2) "So, I take it you don't want to settle it?" RP 6; and (3) "Are you willing to do that?" in response to the State's request that Mr. Zahn waive speedy trial time. RP 7.

Following only those three questions, the court relieved appointed counsel and declared Mr. Zahn was representing himself. RP 6-8. The court ended the hearing – the transcription of which lasts a mere three and one half pages – with "Mr. Wargin [appointed defense counsel] will withdraw, the Court's approved. Defendant is representing himself pro se. [inaudible]." RP 8. The court then adjourned the case one week for arraignment. RP 7-8. Mr. Wargin filed a written Notice of Withdrawal on October 12, 2017. Supp. CP __, sub. no. 10.

Second court appearance: October 16, 2017:

At the following court appearance on October 16, 2017, Mr. Zahn immediately made clear his intent not to proceed pro se but to secure representation through an attorney. In response to a statement from the clerk or the bailiff[3] that Mr. Zahn was representing himself, Mr. Zahn

[3] The transcript attributes the statement to "unknown." A contextual reading suggests the speaker is the person who calls calendared cases into the record, presumably the court clerk or bailiff.

immediately replied, “And I’m currently saving money to have someone defend me, but I just hadn’t --- haven’t met that mark yet. I should this week and so I was gonna ask for a week continuance.” RP 11. In response to Mr. Zahn’s statement that, contrary to the clerk’s statement that he was appearing pro so, he was trying to hire an attorney, the court inquired, “Have you made contact with a lawyer?” and “[Y]ou’ve discussed what the necessary fees are?” both to which Mr. Zahn replied, “Yes, sir.” RP 11-12. Mr. Zahn then reiterated his request for time to secure counsel. “I get paid on Tuesday and uh at that time I --- I should have enough money to have him represent me or defend me.” RP 12. Finally, before adjourning the case, the court secured another speedy trial waiver from Mr. Zahn and reiterated, “And the purpose for that continuance would be to make final arrangements with your private counsel, is that correct?” to which Mr. Zahn replied, “Yes, sir.” RP 12.

Third court appearance: October 23, 2017:

When Mr. Zahn appeared on the next court date of October 23, 2017, he immediately alerted the court he had secured representation by a special master. RP 16. The court inquired as to the status of the special master and determined that person was not an attorney licensed to practice in Washington. RP 16-18. Rather than adjourn for Mr. Zahn to retain private counsel, appoint new counsel for Mr. Zahn, or inquire as to

whether Mr. Zahn intended to proceed pro se, the court sua sponte launched into a colloquy, despite the absence of an unequivocal request – or any request – from Mr. Zahn to proceed pro se.

The court told Mr. Zahn he had a right to represent himself. RP 17. At that point, Mr. Zahn did not request to represent himself. RP 17. The court then inquired into Mr. Zahn's education, prior experiences with self-representation, his understanding of the charges and penalties, and his constitutional rights. All of this occurred prior to a request to proceed pro se. RP 17-23.

After the colloquy, the court again informed Mr. Zahn of the right to self-representation without an inquiry from Mr. Zahn. RP 23. It is only towards the end of the colloquy, and again without a request from Mr. Zahn, that the court asked, "Is it your intent to go forward and represent yourself or are you asking the Court to appoint an attorney that's authorized to practice in the State of Washington?" RP 24. Mr. Zahn acquiesced, responding, "It's my intent . . . [t]o go forward and represent myself, Your Honor." RP 24. The court then concluded the colloquy. RP 24-26.

The court found Mr. Zahn "knowingly and willingly and intelligently" waived his right to counsel. RP 26. The court arraigned Mr. Zahn and adjourned the case for an omnibus hearing. RP 26-28.

Additional pre-trial appearances:

Mr. Zahn failed to follow and expressed a lack of understanding of basic court procedures at each of the following court appearances. *See, e.g.*, RP 34 (Q: "Do you understand Mr. Zahn?" A: "No, Your Honor." Q: "Am I making clear sense to you?" A: "No, no."). Mr. Zahn failed to file omnibus motions, including no motion to challenge his seizure, no motion to suppress the property recovered from his person, and no motion for discovery, despite the existence and availability of a videotape of relevant events.[4] CP 42; RP 31-36, 44-45, 48-49.

The day before trial, Mr. Zahn moved to dismiss the charges. CP 52-53; RP 55. Among other things, Mr. Zahn alleged that the court lacked impartiality because Mr. Zahn had filed a civil suit against the court and the prosecutor. CP 52. Mr. Zahn alleged this created a bias that required the judge to recuse himself. CP 52. The court issued an order containing two findings: (1) Mr. Zahn did not timely file the motion to dismiss, which the court characterized as an affidavit of prejudice; and (2) that the

[4] The videotape reflected the rear of the police car in which the arresting officer transported Mr. Zahn from the site of the traffic stop to the Okanogan County jail. RP 132-36. After he watched the videotape, the arresting officer alerted jail personnel that Mr. Zahn might have contraband concealed on his person. *Id.* Although witnesses testified about what the video depicted and the State referred to it, the videotape was not introduced at trial, and Mr. Zahn did not receive a copy. RP 126, 132-36.

court "does not see actual conflict" between Mr. Zahn and the court. CP 51. The court denied the motion. CP 51.

The trial & sentencing:

The entire trial – jury selection, opening statements, a 3.5 hearing, testimony of five witnesses, jury instructions, closing arguments, deliberations, and verdict – lasted a single day. RP 61-239.

In his opening statement, the prosecutor informed the jury that, while Mr. Zahn was being questioned by Sergeant Arnold, "The defendant declined to say really anything further about the event." RP 127. In addition, in response to questioning about his interrogation of Mr. Zahn, Sergeant Arnold testified, while he was questioning Mr. Zahn and after advising him of his *Miranda* rights, "He did tell me that he had brought it in and that at that point he didn't want to talk to me anymore." RP 142-43.

Mr. Zahn asked almost no questions of any witnesses, and his opening statement and closing argument were short and largely stricken from the record. *See generally* RP 127-228.

Following the conclusion of the prosecutor's rebuttal argument, the Court addressed the prosecutor in front of the jury and addressed the jury directly. The court referred to the two exhibits admitted as the alleged heroin as "drugs," "actual drugs," "contraband," and "harmful

substances."[5] RP 224-25. The court stated, "Counsel, we have drugs here and typically they don't go back in the jury room with the jurors and that's somewhat why we have pictures here." RP 224. "There is a photograph, but typically the evidence that's in the bags, the actual drugs, normally don't go back." RP 225. The court immediately followed with, "I just wanted to let the jurors be aware of that." RP 225. The court continued on, "we do not [let] contraband back to the jury room . . . Obviously, that type of thing . . . could be harmful substances and such in those bags and things and that's why they don't just go back [into the jury room]." RP 225.

A jury convicted Mr. Zahn of the sole count of possession of a controlled substance. CP 21. The court sentenced Mr. Zahn to three months confinement followed by twelve months community custody. CP 8-9. The court also found that Mr. Zahn's chemical dependency contributed to the offense and ordered a substance use disorder evaluation and any recommended treatment. CP 6, 9; RP 248-50. Finally, the court imposed all mandatory and discretionary legal financial obligations

[5] Although the court did not refer to a specific exhibit number, it is clear from the record the court is referring to the two exhibits of objects recovered from Mr. Zahn suspected to be heroin. *See* RP 224-225; Supp. CP __, sub. no. 65 (Exhibit list describing Ex. 10 as "Bag w/ packages sent to lab" and Ex. 11 as "Baggies sent to lab Heroin + Cap").

totaling $2,210.50 and ordered payment start at $50/month commencing sixty days after Mr. Zahn's release from confinement. CP 10-11.

E. ARGUMENT

1. The court erred in forcing Mr. Zahn to proceed pro se in the absence of an unequivocal request to do so and without ensuring Mr. Zahn knowingly and intelligently waived his right to counsel, requiring reversal and a new trial.

a. Courts may not permit individuals to relinquish their constitutional rights to counsel without an unequivocal request from the defendant and a knowing and voluntary waiver.

Individuals charged with crimes have a constitutional right to the assistance of counsel. Const. art. 1, § 22; U.S. Const. amends. 6, 14. Because of the importance of this constitutional right, courts "must indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel." *State v. Curry*, __ Wn.2d __, 423 P.3d 179, 184 (2018) (internal citations omitted); *Faretta v. California*, 422 U.S. 806, 835-36, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975) (requiring knowing and voluntary waiver of right to counsel and assurance defendant is aware of dangers and disadvantages of self-representation). Courts must engage in a two-step determination before permitting a defendant to proceed pro se: "First, the court must determine whether the request for self-representation is timely and unequivocal" by analyzing "(1) Was a request made? If so (2) was that request unequivocal?" *Curry*, 423 P.3d at 184-

85. "Second, if the request is timely and unequivocal, the court must then determine whether the request is also voluntary, knowing, and intelligent." *Id.* at 184. Only where courts engage in this two-step inquiry and determine both that a defendant made an unequivocal request and that the defendant is knowingly and voluntarily waiving his right to counsel does the strong presumption against the waiver of the right to counsel dissolve and may a court permit a defendant to proceed pro se.

b. Mr. Zahn made no unequivocal request to proceed pro se.

i. Courts must evaluate the context of statements to determine if a defendant made an unequivocal request to proceed pro se.

In the absence of a clear and unequivocal request to proceed pro se, the court may not permit it. *Curry*, 423 P.3d at 184. "Trial courts must indulge in every reasonable presumption against a defendant's waiver of his or her right to counsel." *Id.* at 184 (internal quotations omitted). The principle that a defendant must request to proceed pro se is evidenced by the rule that a court need not advise defendants of their right to proceed pro se; rather, defendants must affirmatively make a request. *See State v. Fritz*, 21 Wn. App. 354, 359, 585 P.2d 173 (1978) ("In order to exercise this right [to self-representation], it is incumbent on the defendant to request it, and the court is not initially required to advise a defendant of that right.").

In evaluating a suspected request for self-representation, courts must consider "how the request was made," "the language used in the actual request," and "the context surrounding the request." *Curry*, 423 P.3d at 185. A court may not rely merely on the words spoken but "must view the record as a whole, keeping in mind the presumption against the effective waiver of right to counsel." *In re Detention of Turay*, 139 Wn.2d 379, 396, 986 P.2d 790 (1999); *State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 690 (1995) (holding statements must be "[t]aken in the context of the record as a whole," and that, when they were, it was clear the defendant's statements were only "an expression of frustration by [the defendant] with the delay in going to trial and not . . . an unequivocal assertion of this right to self-representation"); *see also State v. Woods*, 143 Wn.2d 561, 587, 23 P.3d 1046 (2001) (finding statement that defendant will "be prepared to proceed with-with this matter here without counsel come October 21st" to be expression of frustration and displeasure with trial delay, not unequivocal request to proceed pro se).

ii. Mr. Zahn's one sentence comment expressed frustration, not an unequivocal request to proceed pro se.

At Mr. Zahn's first court appearance, he made a passing, one sentence reference to proceeding pro se. Mr. Zahn stated, "I just don't feel that I can fully trust um my attorney and um I would like to represent

myself in this matter." RP 6. It is not clear from the record whether Mr. Zahn was referring to his appointed attorney, who was not present in court, or the attorney present in court with him who was standing up on behalf of assigned counsel. Regardless, by the very words he spoke, Mr. Zahn's request was as much one expressing dissatisfaction with his attorney as it was a request to proceed pro se. The court did not inquire into the attorney-client conflict or ascertain whether Mr. Zahn wanted another lawyer appointed.

Here, Mr. Zahn's statement was not made formally in a motion; it was a spontaneous statement at what should have been an arraignment. *Compare with Curry*, 423 P.3d at 187 (then-defense attorney filed written motion for defendant to proceed pro se). The language of the statement expressed a lack of frustration and trust with his attorney. *Compare with Curry*, 423 P.3d at 188 (finding defendant's repeated request was not accidental, inadvertent, spontaneous comment, or mere musing). Despite this, and without any inquiry, the court declared, "Mr. Wargin [appointed defense counsel] will withdraw, the Court's approved. Defendant is representing himself pro se. [inaudible]." RP 8.

iii. Mr. Zahn's later acquiescence was not an unequivocal request to proceed pro se.

Mr. Zahn's statements at the following court dates referencing only his attempts to retain private counsel demonstrate that his earlier comment was not a request to proceed pro se but a request to secure alternate representation. Because Mr. Zahn lacked the money to hire an attorney but was trying to gather the funds, at the very next court date, Mr. Zahn, representing himself per the court's previous declaration, explained to the court he needed more time to hire representation. RP 11 ("And I'm currently saving money to have someone defend me, but I just hadn't --- haven't met that mark yet. I should this week and so I was gonna ask for a week continuance."). He agreed with the court that he had been in contact with a lawyer and had discussed a fee agreement, and the case was adjourned a week. RP 11-12.

At the following court date, Mr. Zahn again did not request to proceed pro se. He requested to have a special master appoint him.[6] When the court denied this request, the court immediately launched into a colloquy to determine whether Mr. Zahn was knowingly and voluntarily waiving his right to counsel. However, at this point, Mr. Zahn had made

[6] Mr. Zahn cites this request not to argue the court erred in refusing to permit the special master to represent him but as evidence of Mr. Zahn's intent not to represent himself but to have representation.

no unequivocal request to proceed pro se. Eventually, towards the end of the colloquy, the court gave Mr. Zahn two alternatives: "Is it your intent to go forward and represent yourself or are you asking the Court to appoint an attorney that's authorized to practice in the State of Washington?" RP 24. The court solicited an agreement from Mr. Zahn to proceed pro se. Mr. Zahn did not unequivocally request to proceed pro se; he acquiesced to the court.

Mr. Zahn's every action from the first court date through the court's eventual colloquy weeks later reflected a desire <u>not</u> to proceed pro se. After his first court date, Mr. Zahn immediately tried to retain someone to represent him. Although the court did not err in refusing to allow the special master to represent Mr. Zahn, Mr. Zahn's efforts to secure representation for himself reflects his desire to have representation, not to proceed pro se. *See, e.g., Fritz*, 21 Wn. App. at 360 (recognizing, "[e]ven when the right is unequivocally asserted, however, it may still be subsequently waived by words or conduct."). In the same way that a court may not deny an unequivocal request to proceed pro se "simply because affording the right will be a burden on the efficient administration of justice," a court may not thrust self-representation on a defendant simply to further the efficient administration of the court proceedings. *State v. Madsen*, 168 Wn.2d 496, 509, 229 P.3d 714 (2010).

In *Curry*, our Supreme Court reviewed several factors in finding a defendant made an unequivocal request to proceed pro se. Here, unlike in *Curry*, then-existing defense counsel failed to file a written motion outlining the legal standards and relevant facts that permitted the defendant to proceed pro se, the court held no formal hearing on the issue, entered no written findings or conclusions, the court failed to fully inquire into Mr. Zahn's motivation, education, and whether the decision was his alone, and the court failed to appoint standby counsel. *See Curry*, 423 P.3d at 187. The absence of all of these events reflects both the absence of an unequivocal request and of a knowing and voluntary wavier of the right to counsel.

At no point prior to the colloquy did Mr. Zahn make an unequivocal request to represent himself. This fails the first prong of the two step analysis for determining if a request for self-representation was unequivocal.

c. The court failed to ensure that Mr. Zahn knowingly and voluntarily waived his constitutional right to counsel.

i. <u>The court must conduct an adequate inquiry to ensure the individual is knowingly and voluntarily waiving their constitutional right to counsel.</u>

Words reflecting a desire to proceed pro se are not enough. In addition to an unequivocal request, before permitting a defendant to

proceed pro se, the court must determine the defendant understands the request and that, by the nature of the request, he is knowingly and voluntarily waiving his right to counsel. Therefore, an unequivocal request does not end the inquiry. *See Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 82 L. Ed. 1461 (1936) (finding immediate waiver of counsel at arraignment not intentional, intelligent waiver of counsel). A court must also engage in a colloquy or otherwise determine that the request is a knowing and voluntary wavier of counsel. One without the other is insufficient.

Although "[t]here is no formula" for determining whether a defendant's waiver is a knowing and voluntary waiver of counsel, courts have identified certain issues that, at a minimum, courts must discuss with defendants or of which the record must show the defendant was aware. *State v. Silva*, 108 Wn. App. 536, 539, 31 P.3d 729 (2001). At minimum courts have held the colloquy or evidence should be sufficient to ascertain that the individual understands "the seriousness of the charge, the possible maximum penalty involved, and the existence of technical procedural rules governing the presentation of his defense." *State v. DeWeese*, 117 Wn.2d 369, 378, 816 P.2d 1 (1991). This ensures a defendant "was fully apprised of [relevant] factors and other risks associated with self-representation that would indicate that he made his decision with his 'eyes

open.'" *Silva*, 108 Wn. App. at 540 (holding even particularly skillful defendant lacked relevant knowledge to make knowing and voluntary waiver) (quoting *City of Bellevue v. Acrey*, 103 Wn.2d 203, 211, 691 P.2d 957 (1984)).

ii. <u>The court initially forced Mr. Zahn to proceed pro se without conducting any inquiry whatsoever.</u>

The court declared Mr. Zahn was proceeding pro se at his initial court appearance on October 9, 2017. RP 5-8. In addition, the court permitted Mr. Zahn's counsel to withdraw at that time. RP 5-8; Supp. CP __, sub. no. 10. However, the court engaged in no inquiry whatsoever to determine whether Mr. Zahn's request to proceed pro se was a knowing and voluntary waiver of his right to counsel.

The court asked Mr. Zahn a total of three questions, only one of which related to his reference to proceeding pro se. After stand-in defense counsel informed the court of the issue, the court responded first, "Okay, Mr. Zahn, tell me, what's going on?" to which Mr. Zahn responded, "I just don't feel that I can fully trust um my attorney and um I would like to represent myself in this matter." RP 6. Second, the court asked, "So, I take it you don't want to settle it?" to which Mr. Zahn replied, "Um not --- not with counsel, not at this time." RP 6. Third, at the State's request, the

court asked Mr. Zahn if he was willing to waive speedy arraignment for one week, to which Mr. Zahn replied, "Yes, sir." RP 7.

None of these three questions constitute an adequate inquiry. The court did not address the seriousness of the charge, the penalties, technical, procedural rules associated with presenting a defense, or any other information relevant to making a knowing and voluntary waiver of the right to counsel. *See DeWeese*, 117 Wn.2d at 375-80; *Silva*, 108 Wn. App. at 539-42. The court made no other inquiries but pronounced, "Defendant is representing himself pro se" and permitted appointed counsel to withdraw. RP 8. The court treated Mr. Zahn as a pro se defendant from this point forward, despite the complete and total lack of any inquiry into his waiver of the right to counsel. Without determining Mr. Zahn knowingly and voluntarily waived his right to counsel, the court erred in forcing Mr. Zahn to proceed pro se from this first court date forward.

iii. <u>The court's eventual colloquy failed to adequately determine that Mr. Zahn knowingly and voluntarily waived his right to counsel.</u>

Weeks later, after declaring Mr. Zahn pro se at his first court appearance and treating Mr. Zahn as pro se at several court appearance, the court eventually engaged in a colloquy. RP 16-23. However, at that time, Mr. Zahn did not unequivocally requested to proceed pro se. Rather,

the court launched into a colloquy in response to Mr. Zahn's attempt to appoint a special master to represent him. The court inquired into Mr. Zahn's education, prior experiences, understanding of the charges and penalties, and his constitutional rights. All of this occurred prior to a request to proceed pro se. RP 16-23.

Only after again being informed by the court that he had a right to represent himself and after the colloquy, the court asked, "Is it your intent to go forward and represent yourself or are you asking the Court to appoint an attorney that's authorized to practice in the State of Washington?" RP 24. Mr. Zahn acquiesced, responding, "It's my intent . . . [t]o go forward and represent myself, Your Honor." RP 24. The court then continued with the colloquy. RP 24-26. It found Mr. Zahn "knowingly and willingly and intelligently" waived his right to counsel. RP 26.

The court's inquiry was not prompted by Mr. Zahn's unequivocal request to proceed pro se. It occurred *after* the court had already relieved counsel and treated Mr. Zahn as pro se. Any colloquy *before* Mr. Zahn eventually acquiesced and agreed to proceed pro se does not establish that, at the time Mr. Zahn started proceeding pro se, he had made a knowing and voluntary waiver of his constitutional right to counsel.

d. The court erred in forcing Mr. Zahn to proceed pro se; therefore, reversal is required.

At the outset of the case, the court immediately relieved appointed counsel and declared Mr. Zahn was representing himself. Mr. Zahn had not made an unequivocal request. The court made no inquiry whatsoever into whether Mr. Zahn was knowingly and voluntarily waiving his right to counsel at that time. Subsequent statements and behavior by Mr. Zahn indicated not an intent to proceed pro se but to secure representation. Later, when the court determined Mr. Zahn's desired representation impermissible, the court immediately launched into a colloquy without an unequivocal request to proceed pro se from Mr. Zahn. It was only after Mr. Zahn had been representing himself for two weeks through three court appearance and after the court engaged in a colloquy that the court extracted an agreement from Mr. Zahn to continue pro se. An inquiry before an unequivocal request does not ensure the defendant has made an informed decision to proceed pro se and is inconsistent with the strong presumption against the waiver of counsel.

Because the court's decision to force Mr. Zahn to proceed pro se was manifestly unreasonable and done without applying appropriate legal standards, the court erred in forcing Mr. Zahn to proceed pro se. Therefore, this Court should reverse the conviction and remand for a new trial. *Silva*, 108 Wn. App. at 542.

2. The State's comments encouraged the jury to draw negative inferences from Mr. Zahn's exercise of his right to remain silent.

The State impermissibly commented on Mr. Zahn's right to silence in two separate instances. First, in its opening statement, the prosecutor stated that, in response to police questioning, "The defendant declined to say really anything further about the event." RP 127. Second, Sergeant Arnold testified that after he read Mr. Zahn his *Miranda* warnings, "at that point he didn't want to talk to me anymore." RP 143. Both of these instances constitute impermissible comments on Mr. Zahn's constitutional right to remain silent, depriving him of a fair trial and requiring reversal.

a. The right against self-incrimination includes a right to silence.

The Fifth Amendment provides, "No person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. 5, amend. 14. Likewise, the Washington constitution provides, "No person shall be compelled in any criminal case to give evidence against himself." Const. art. 1, § 9. The constitutional right against self-incrimination includes the right to refrain from speaking with police or answering questions. *Miranda v. Arizona*, 384 U.S. 436, 473-74, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). "Our constitutions protect the right of an accused to remain silent." *State v. Burke*, 163 Wn.2d 204, 206, 181 P.3d 1 (2008).

b. The State violates a person's constitutional rights when it comments on a person's invocation of his right to silence.

Comments on an individual's invocation of his right to remain silent after receiving *Miranda* warnings are "fundamentally unfair and a deprivation of due process" because they "allow the arrested person's silence" to be used against them at trial, in violation of the promise of *Miranda*. *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976). "The use of silence at the time of arrest and after the *Miranda* warnings is fundamentally unfair and violates due process." *State v. Easter*, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996); *State v. Romero*, 113 Wn. App. 779, 788, 54 P.3d 1255 (2002). Therefore, courts may not permit comment on a defendant's invocation of his right to silence.

As this Court has itself recognized, "The exercise of constitutionally guaranteed *Miranda* rights must be without penalty." *State v. Curtis*, 110 Wn. App. 6, 8, 37 P.3d 1274 (2002). This constitutional guarantee prohibits comment on a defendant's refusal to answer questions after he has been Mirandized. "A police witness may not comment on the silence of the defendant so as to infer guilt from a refusal to answer questions." *State v. Lewis*, 130 Wn.2d 700, 705, 927 P.2d 235 (1996) (although denying relief because officer's testimony did not constitute comment on silence). "*[A]ny* direct police testimony as to the defendant's

refusal to answer questions is a violation of the defendant's right to silence." *Romero*, 113 Wn. App. at 792 (emphasis in original).

In *Chapman v. California*, the United State Supreme Court held a prosecutor's comments and arguments on the defendants' silence was constitutional error requiring reversal. 386 U.S. 18, 19-20, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Likewise, Washington courts have routinely held testimony and comment on a defendant's refusal to answer questions or other invocation of his right to silence is constitutional error. For example, in *Romero*, this Court held that an officer's testimony, "I read him his *Miranda* warnings, which he chose not to waive, would not talk to me," was an impermissible comment on right to remain silent, requiring reversal. 113 Wn. App. at 793. Similarly, in *Curtis*, this Court found impermissible asking a witness whether the defendant said anything in response to receiving *Miranda* warnings because such question had "no discernable purpose other than to inform the jury that the defendant refused to talk to the police without a lawyer." 110 Wn. App. at 14 (finding constitutional error and reversing). In *State v. Perrett*, this Court held a deputy's testimony that "he [referring to the defendant] said he had nothing to say" was an improper comment on the defendant's exercise of his Fifth Amendment right. 86 Wn. App. 312, 322, 936 P.2d 426 (1997) (reversing and remanding). Finally, in *Douglas v. Cupp*, the Ninth Circuit

held the testimony, "Q. Did he make statements to you? A. No," "acted as an impermissible penalty on the exercise of the petitioner's right to remain silent and required reversal of the conviction. 578 F.2d 266, 266-67 (9th Cir. 1978). *See generally Burke*, 163 Wn.2d at 216 n.7 (compiling cases).

c. The prosecutor's opening statement and Sergeant Arnold's testimony both commented on Mr. Zahn's invocation of his right to remain silent in violation of his right against self-incrimination.

In his opening statement, the prosecutor informed the jury that, while Mr. Zahn was being questioned by Sergeant Arnold, "The defendant declined to say really anything further about the event." RP 127. In addition, Sergeant Arnold testified that, while he was questioning Mr. Zahn and after giving him *Miranda* warnings, "He did tell me that he had brought it in **and that at that point he didn't want to talk to me anymore**." RP 142-43 (emphasis added). Both the statement and the testimony were direct references to Mr. Zahn's clear and unequivocal invocation of his right to silence after he was Mirandized. No legitimate purpose existed for commenting on Mr. Zahn's invocation of his right to silence.

Sergeant Arnold's testimony that Mr. Zahn said "he didn't want to talk to me anymore" (RP at 143), is remarkably similar to comments courts have found improper in other cases. This was not a mere passing

reference to silence but two direct comments on Mr. Zahn's invocation of his right to silence. *Compare Romero*, 113 Wn. App. at 794 ("The testimony surrounding Mr. Romero's silence served no probative purpose other than to infer that his silence and lack of cooperation 'was more consistent with guilt than with innocence.'" (quoting *Curtis*, 110 Wn. App. at 14)) *with State v. Sweet*, 138 Wn.2d 466, 481, 980 P.2d 1223 (1999) (finding mere reference not comment on silence).

Here, Sergeant Arnold expressly testified that Mr. Zahn invoked his right to silence after Sergeant Arnold read him his *Miranda* rights, and the prosecutor's remark noted the same. Here, like in *Curtis*, Mr. Zahn's silence was "post-*Miranda*," "[t]he evidence was not offered for impeachment," and the comments were "during the State's case in chief." *Curtis*, 110 Wn. App. at 11. The State's two comments on Mr. Zahn's clear and unequivocal invocation of his right to silence could have had no purpose other than to encourage the jury to use Mr. Zahn's invocation of his right to silence against him. *See State v. Embry*, 171 Wn. App. 714, 749, 287 P.3d 648 (2012) ("[T]he State improperly comments on a defendant's silence when it uses the defendant's silence to its own advantage either as substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt.").

d. This constitutional error requires reversal.

Impermissible comments on the right to silence are a constitutional issue that may be raised for the first time on appeal. *State v. Holmes*, 122 Wn. App. 438, 445, 93 P.3d 212 (2004) ("A direct comment on silence . . . is always a constitutional error."); *Romero*, 113 Wn. App. at 786. Such impermissible comments are presumed prejudicial and require reversal unless the State proves beyond a reasonable doubt that such constitutional error was harmless. *Chapman*, 386 U.S. at 22-24; *Easter*, 130 Wn.2d at 242-43. Further, in analyzing the prejudice, this Court may consider the impact of the impermissible comments together with other errors in the trial. *See, e.g., Perrett*, 86 Wn. App. at 322-23 (finding deputy's testimony constituting improper comment on defendant's right to silence one of three errors contributing to cumulative error depriving defendant of fair trial and necessitating reversal).

Here, the prosecutor's statement and Sergeant Arnold's testimony were both impermissible comments on Mr. Zahn's clear and unequivocal invocation of his right to silence. No legitimate purpose exists for the introduction of such comments, nor were they in response to testimony or evidence from the defense. Prejudice is presumed to result from this constitutional error, and this Court should reverse and remand for a new trial.

3. The court impermissibly told the jury Mr. Zahn had "actual drugs" in his possession, which relieved the State of its burden to prove this essential element beyond a reasonable doubt.

a. The Washington Constitution prohibits judges from commenting on the evidence

Article IV, § 16 provides, "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." "[T]he purpose of Art. 4, § 16 of the Washington constitution, 'is to prevent the jury from being influenced by knowledge conveyed to it by the court as to the court's opinion of the evidence submitted.'" *State v. Lampshire*, 74 Wn.2d 888, 892, 447 P.2d 727 (1969) (quoting *Heitfeld v. Benevolent Protective Order of Keglers*, 36 Wn.2d 685, 699, 220 P.2d 655 (1950)). Unconstitutional comments on the evidence include instructions to the jury on factual matters and comments that convey to the jury the court's personal opinion on the evidence. *State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997) ("[A] court cannot instruct the jury that matters of fact have been established as a matter of law."). "[A]ny remark that has the potential effect of suggesting that they jury need not consider an element of an offense could qualify as judicial comment." *State v. Levy*, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

The court's intent in making a comment is irrelevant to the analysis. The issue is whether the comment conveys the court's opinion

on the evidence to the jury. In *Lampshire*, our Supreme Court found a court's remark, though inadvertent, made in front of the jury in responding to an objection from the prosecution "implicitly conveyed to the jury his personal opinion concerning the worth of the defendant's testimony." 74 Wn.2d at 892. Thus, "if the trial judge conveys to the jury his personal opinion regarding the truth or falsity of any evidence introduced at the trial he has violated the constitutional mandate." *State v. Bogner*, 62 Wn.2d 247, 250, 382 P.2d 254 (1963).

Our constitution prohibits such comments not only to prevent the court from relieving the State of its burden and to prevent the jury from being influenced by the court's opinion but also to maintain an appearance of fairness. *See generally Lampshire*, 74 Wn.2d at 894 (holding cumulative error, including improper judicial comments, deprived defendant of right to fair trial); *see also State v. Gamble*, 168 Wn.2d 161, 187, 225 P.3d 973 (2010) (discussing appearance of fairness doctrine requires "a reasonably prudent, disinterested observe would conclude that the parties received a fair, impartial and neutral hearing."). To permit comments suggesting the judge favored one side or the other or believed or failed to believe the evidence could undermine public confidence in the judicial system. *See State v. Jackman*, 156 Wn.2d 736, 743-44, 132 P.3d

136 (2006) (purpose of section 16 is to prohibit conveyance of express or implied personal feelings and attitudes of the judge).

b. The court's reference to the exhibits as "drugs," "actual drugs," "contraband," and "harmful substances" impermissibly conveyed to the jury that the court believed the exhibits to be controlled substances.

An essential element of the offense of possession of a controlled substance is that the individual charged possessed something that was, in fact, a controlled substance. Not only is "controlled substance" an essential element of RCW 69.50.4013, but the specific identity of the controlled substance is an essential element. *See State v. Gonzalez*, 2 Wn. App. 2d 96, 105-110, 408 P.3d 743 (2018). Here, where the court referred to the exhibits as "actual drugs" and more, it communicated to the jury the court's opinion that the evidence was, in fact, a controlled substance as charged.

Immediately following the conclusion of the prosecutor's rebuttal argument, the court addressed the prosecutor in front of the jury and addressed the jury directly. The court referred to the two exhibits admitted as the alleged heroin as "drugs," "actual drugs," "contraband,"

and "harmful substances."[7] RP 224-25. The court stated, "Counsel, **we have drugs here** and typically they don't go back in the jury room with the jurors and that's somewhat why we have pictures here." RP 224 (emphasis added). "There is a photograph, but typically the evidence that's in the bags, **the actual drugs**, normally don't go back." RP 225 (emphasis added). The court clearly addressed its comments to the jury, immediately following the above comments with, "I just wanted to let the jurors be aware of that." RP 225. The court then continued on, stating "we do not [let] **contraband** back to the jury room . . . Obviously, that type of thing . . . could be **harmful substances** and such in those bags and things and that's why they don't just go back [into the jury room]." RP 225 (emphasis added).

First, the court specifically directed some of its comments directly to the jury. Second, to the extent the comments were direct to counsel, even comments to counsel in front of the jury may constitute impermissible comments on the evidence. *See, e.g., Balandzich v. Demeroto*, 10 Wn. App. 718, 725, 519 P.2d 994 (1974) (acknowledging

[7] Although the court did not refer to a specific exhibit number, it is clear from the record the court is referring to the two exhibits of objects recovered from Mr. Zahn suspected to be heroin. *See* RP 224-225; Exhibit list (describing Ex. 10 as "Bag w/ packages sent to lab" and Ex. 11 as "Baggies sent to lab Heroin + Cap").

that "if statements by the court addressed to counsel in the presence of the jury are made in such a way or under such circumstances as to indicate to the jury the court's opinion concerning the truth or falsity of evidence given, or lack of confidence in the integrity of the witness, Const. art. 4, § 16 will be violated.").

Whether or not the items admitted as exhibits 10 and 11 constituted the charged controlled substance was an essential element of the offense the State was required to prove beyond a reasonable doubt and was a question of fact for the jury. The court's comments conveyed to the jury the court's opinion that the exhibits were, in fact, the controlled substance charged. The comments effectively informed the jury that this factual issue was established as a matter of law. The court's comments amounted to an impermissible comment on the evidence in violation of article IV, section 16 and relieved the State of its burden of proving an essential element of the offense.

c. Prejudice is presumed from these impermissible comments and reversal is required.

The court's sua sponte comments violate Mr. Zahn's fundamental and constitutional rights and can be raised for the first time on appeal. *Lampshire*, 74 Wn.2d at 893 ("Since a comment on the evidence violates a

constitutional prohibition, the defendant's failure to object or move for a mistrial does not foreclose her from raising this issue on appeal").

Courts presume prejudice from judicial comments on the evidence. *Id.* at 892. Reviewing courts must reverse the conviction and remand for a new trial unless the State affirmatively proves no error resulted from judicial comments on the evidence. *Jackman*, 156 Wn.2d at 743; *Bogner*, 62 Wn.2d at 256 ("We cannot say that it affirmatively appears that the jury could not have been influenced by the comments of the trial judge. We hold that the violation of Art. 4, § 16, of the Washington Constitution constituted reversible error in this case.").

Here the State cannot prove the jury could not have been influenced by the court's impermissible comments. Neither the fact that the items were a controlled substance nor the specific identity of the controlled substance were matters to which Mr. Zahn stipulated. The jury was entitled to doubt the validity of the testing performed by the crime lab. In addition, even comments on seemingly uncontested evidence may be prejudicial. For example, in *Jackman*, the Court found the inclusion of the victims's dates of birth in a jury instruction "conveyed the impression that those dates had been proved to be true" and, therefore, constituted an impermissible comment on the evidence. 156 Wn.2d at 744. The court further held the State failed to prove no prejudice resulted even where the

victim's age was not in dispute. *Id.* at 743-45. The Court noted that despite the fact the defense did not challenge this element, "Nevertheless, it is still conceivable that the jury could have determined that the boys were *not* minors at the time of the events, if the court had not specified the birth dates in the jury instructions." *Id.* at 745.

Further, the only offense with which Mr. Zahn was charged was the possession of a controlled substances charge. CP 59-60. By proceeding to trial, Mr. Zahn was clearly attempting to hold the State to their burden of proof, as is his right. *See Bogner*, 62 Wn.2d at 254 (in analyzing prejudice from judicial comments, noting "By the appellant's plea of not guilty, every material allegation of the information and every element of the state's case necessary for a conviction was put in issue."). The State cannot prove such improper comments lacked prejudice, particularly where the improper comments regarded the main evidence on the only offense Mr. Zahn faced and were made immediately before the jury entered the jury room and started deliberations. RP 225 (following comments with, "With that, as I stated to begin with, you at this time can begin your deliberations."). The timing of the comments compounded the prejudice.

The court's statements were an improper comment on the evidence in violation of Mr. Zahn's constitutional rights. Courts presume these

unconstitutional comments prejudiced Mr. Zahn. Therefore, this Court should reverse and remand for retrial.

4. The court failed to conduct the required individualized inquiry into Mr. Zahn's present and future ability to pay before imposing LFOs, requiring reversal of the imposition of the discretionary LFOs.

a. The statute prohibits courts from imposing discretionary LFOs except where an individualized inquiry affirmatively demonstrates a person has a present or future ability to pay such obligations.

RCW 10.01.160(3) prohibits courts from imposing costs on indigent defendants. Further, RCW 10.01.160(3) mandates that, even where imposition of LFOs may be appropriate, "To determine the amount and method for paying the costs, 'the court *shall* take account of the financial resources of the defendant and the nature of the burden that payment of costs will impose.'" *State v. Blazina*, 182 Wn.2d 827, 838, 344 P.3d 680 (2015) (quoting RCW 10.01.160(3) (emphasis in original)). Absent an individualized inquiry establishing a person has the ability to pay, the statute prohibits courts from imposing LFOs. The failure to conduct such an inquiry requires a reversal of the imposition of fees and remand for a hearing. *See Blazina*, 182 Wn.2d at 839 (remanding for new sentencing hearings); *see also State v. Christopher*, 185 Wn.2d 1001, 1001, 369 P.3d 149 (2016) (granting petition for review and remanding for sentencing hearing for court to conduct "individualized inquiry into the

Petitioner's current and future ability to pay in light of such nonexclusive factors as the circumstances of his incarceration and his other debts, including nondiscretionary legal financial obligations, and the factors for determining indigency status"); *State v. Como*, 185 Wn.2d 1025, 1025, 377 P.3d 730 (2016) (same); *State v. Ralston*, 185 Wn.2d 1025, 1025, 377 P.3d 724 (2016) (same).

Our Supreme Court interprets this statutory prohibition against the imposition of costs on indigent individuals to require courts perform an individualized inquiry into a person's current and future ability to pay before it may impose discretionary LFOs as part of a sentence. *Blazina*, 182 Wn.2d at 837-38. Such an inquiry must include consideration of certain itemized factors, including a person's incarceration, other debts, and restitution, but may include any relevant factor. *Id.* at 838-39 (describing list of relevant factors as "nonexhaustive").

Appellate courts review de novo the adequacy of a trial court's individualized inquiry.[8] *Blazina*, 182 Wn.2d at 835. Although the pro se Mr. Zahn did not object, this Court may consider this issue on appeal. *Blazina* at 830 (exercising RAP 2.5 discretion to consider unpreserved

[8] Among the issues currently before the Washington Supreme Court in *Ramirez* is the appropriate standard for reviewing the adequacy of a trial court's *Blazina* inquiry. *State v. Ramirez*, 95249-3 (June 26, 2018), *video recording by* TVW, Washington State's Public Affairs Network, http://www.tvw.org, reviewing 1 Wn. App. 2d 1001 (2017) (not reported), *review granted by* 190 Wn.2d 1001 (2018).

challenge to imposition of LFOs without proper inquiry into ability to pay and remanding for new sentence hearing). This Court has followed the exercise of discretion suggested in *Blazina* and reviewed the imposition of LFOs in similar cases. *See, e.g.*, *State v. Malone*, 193 Wn. App. 762, 766, 376 P.3d 443 (2016) (exercising discretion to consider adequacy of LFO inquiry under *Blazina*, despite absence of objection, and remanding where court's inquiry did not consider "incarceration, job status, debts, or other indicators of ability to pay").

b. The court failed to conduct an adequate individualized inquiry.

At the sentencing hearing, the court asked Mr. Zahn a total of two questions regarding his financial situation: (1) "I have to make an inquiry as to what your work history has been say for the last three years?" and (2) "So, upon completion of any jail sentence, will you have employment or feel that you will have employment?"[9] RP 246. After asking only those two questions, the court made a finding Mr. Zahn had the ability to work

[9] In an effort to present himself to the court in the most positive light, Mr. Zahn responded to the first question, "I've worked steady. . . . I have a job right now," and to the second, "Yeah, of course I will." RP 246.

and could make LFO payments, imposed a total of $2,210.50[10] in LFOs, and set a payment schedule[11]. RP 246-47, 249-50; CP 9-11.

The court made no other inquiry into Mr. Zahn's financial circumstances. The court did not inquire into any specifics of Mr. Zahn's employment (for example, where he worked, for whom he worked, how much he earned, for how long he worked there, etcetera). The court made no inquiry into Mr. Zahn's greater financial situation (for example, what his yearly income was, whether he had other sources of income, whether he had other assets, etcetera). Nor did the court inquiry into Mr. Zahn's expenses (for example, the costs of raising his daughter, his living expenses, outstanding debts, etcetera). The court also did not inquire into how Mr. Zahn expected to maintain or secure employment in light of the sentence of incarceration. Finally, the court also did not ask either the State or Mr. Zahn to present arguments on the propriety of imposing LFOs. After the two questions, the court declared simply that Mr. Zahn

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[10] The court imposed the following costs:
$500 Victim Assessment Fee
$200 Criminal Filing Fee
$20.50 Sheriff Service Fee
$250 Jury Demand Fee
$100 Crime Lab Fee
$100 DNA Collection Fee
$1,000 VUCSA Fines
$40 Booking Fee
CP 9-10.

[11] The court ordered payments of not less than $50 per month starting 60 days after Mr. Zahn's release from incarceration. CP 11.

had "the ability to work and therefore, pursuant to Lazina [sic] . . . that he can make payments on the legal financial obligations that the Court may impose." RP 246-47. The Court then seemingly pulled out of thin air the minimum monthly payment of $50. RP 250.

In addition to the lack of an individualized inquiry, the court possessed information that suggested Mr. Zahn did not, in fact, have the ability to pay. First, in the course of a pretrial discussion on omnibus motions, Mr. Zahn told the court it had not yet conducted an indigency determination. RP 34 (Q: "I've already made and determined that you're not indigent, haven't I?" A: "No."). Second, Mr. Zahn's unfocused comments at sentencing indicated to the court he did not have an ability to pay. *See, e.g.*, RP 245 ("I'm trying to not rack up a bill and look at this. A thousand, two fifty, five hundred, two hundred. I mean is there --- is there anything I can do that doesn't cost a lot of money?"). Finally, mere days after the sentencing hearing, the court issued an Order of Indigency which included a finding of indigency. CP 2-4. The court's finding of indigency and order contradict the court's conclusory finding days earlier that Mr. Zahn was able to pay costs.

Neither the court's two questions nor Mr. Zahn's answers to those questions constituted a sufficient individualized inquiry into Mr. Zahn's financial status or ability to pay or provided a sufficient basis to impose

discretionary costs or a payment schedule. This Court recently found a similar inquiry inadequate, reversing imposition of the LFOs and remanding for a new sentencing hearing. *State v. Glover*, __ Wn. App. 2d __, 423 P.3d 290, 293 (2018). In *Glover*, this Court found the inquiry inadequate where the court "asked only about Glover's work history and whether there was any reason she could not work." *Id.* The Court noted the sentencing court "failed to inquire at all about other debts," "failed to examine her financial situation, such as the extent of her assets," and the general failure to consider other important factors *Id.* Finally, this Court specifically noted that the later finding of indigency, presumably for purposes of the appeal, "call[ed] into question [the defendant's] ability to pay." *Id.*

c. This Court should strike the imposition of the discretionary LFOs.

The two questions the court asked Mr. Zahn do not constitute the necessarily individualized inquiry required by the RCWs and Supreme Court precedent. The imposition of discretionary LFOs without the necessarily inquiry cannot stand. This Court should strike the imposition of these LFOs.

F. CONCLUSION

The court forced Mr. Zahn to proceed pro se in the absence of an unequivocal request and with no adequate inquiry into his waiver of the right to counsel. The court also impermissibly commented on the evidence, and the State twice commented on Mr. Zahn's constitutional right to silence. These errors individually and collectively violated Mr. Zahn's constitutional rights and denied Mr. Zahn a fair trial. This Court should reverse Mr. Zahn's conviction and remand for a new trial. At minimum, the Court should strike the imposition of the discretionary LFOs.

DATED this 17th day of September 2018.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
RESPONDENT,	)	
	)	
v.	)	NO. 35805-4-III
	)	
BLAKE ZAHN,	)	
	)	
APPELLANT.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF SEPTEMBER, 2018, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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[X] BLAKE ZAHN	(X)	U.S. MAIL
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SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF SEPTEMBER, 2018.

X_____

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Appellate Court Case Number:	35805-4
Appellate Court Case Title:	State of Washington v. Blake Andrew Zahn
Superior Court Case Number:	17-1-00343-1

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