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Division III
State of Washington
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NO. 358054-III

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

STATE OF WASHINGTON

PLAINTIFF/RESPONDENT,

V.

BLAKE ANDREW ZAHN

DEFENDANT/APPELLANT

AMENDED BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

A. Procedural History

1. Preliminary Appearance and Charging

On September 26, 2017, the defendant was arrested and booked into the Okanogan County Jail. Shortly after the defendant was booked, law enforcement located heroin on the defendant's person. [CP 4]

The defendant's preliminary appearance was held the following morning in Okanogan County Superior Court. Judge Christopher Culp informed the defendant that if he could not afford an attorney, that one would be appointed for him. Judge Culp appointed an attorney to represent the defendant. Defense Attorney Randy Thies represented the defendant for the purposes of the preliminary hearing. [CP 2] After argument from Defense Attorney Thies and Deputy Prosecutor Drangsholt, the Court found probable cause for the crime of Possession of a Controlled Substance-Heroin. [CP 3] The State requested \$7,500 bail, but the Court set bail at \$5,000 after hearing argument from the Defense. [CP 1] The defendant's arraignment was scheduled for October 9, 2017. *Id.* Later that day, attorney Jason Wargin formally entered his notice of appearance on behalf of the defendant. [CP 6]

2. October 9, 2017 Arraignment Hearing

On October 9, 2017, the Defendant appeared with counsel at his scheduled arraignment hearing before Judge Pro Tem David Edwards. [CP 7] Defense Counsel was Melissa McDougall, who appeared for Attorney Wargin for the purposes of this hearing. Attorney McDougall made a record that although there was a potential settlement agreement, she had spoken with the defendant earlier that morning and learned that “Mr. Zahn said, change of plans, he wants to represent himself.” [RP 5:3 – RP 5:24] The Court asked the defendant what his intent was. The defendant replied “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 6:1 – RP 6:18] The defendant further stated that he did *not* wish to settle the case with the assistance of counsel, and he asked to continue the arraignment hearing for one week. The State noted that it had no objection to this, just so long as it was understood that timely arraignment was being waived by the defendant. The defendant agreed to this, and the Court continued arraignment to October 16, 2018. The Court permitted Attorney MacDougall to inform Attorney Wargin that he could withdraw from the case. Attorney Wargin formally filed his notice of withdrawal on October 12th 2018. [CP 10]

3. October 13, 2017 Filing

On October 13, 2017 the defendant filed a document titled 'Notice of Appointment of Special Master.' [CP 11] The document was signed by the defendant and marked with his thumbprint. The document stated that someone named Louis Holger was to be authorized as the Defendant's 'Special Master' for the case. Louis Holger was identified as "President of the United States, the Original 13 Colonies, and its Respective Districts."

4. October 16, 2017 Arraignment Hearing

The defendant appeared for his arraignment on October 16, 2017 before Judge Henry Rawson. Attorney MacDougall made a record that the defendant previously voiced his desire to represent himself, and that based on this representation the Pro Tem Judge permitted Attorney Wargin to withdraw from the case. [RP 11:3-16]

The defendant told Judge Rawson that he was saving money to have someone defend him, and asked for an additional one week continuance. The Court questioned the defendant about his efforts to contact an attorney. The Court explained to the defendant that he had previously waived his right to a timely arraignment with the last continuance, and clarified that he was making a new request to continue his arraignment, and that this continuance was at his request. The defendant stated that it was. The Court granted the defendant's request, and the arraignment was

continued to October 23, 2017. [RP 11:22 – 13:23; CP 12] Later that day Attorney Wargin filed another Notice of Withdrawal. [CP 12]

5. October 20, 2017 Filings

A document titled “Entry of Appearance Instruction in the best Interest of Justice” was filed by the defendant on October 20, 2017. This document contained a section completed by Louis Holger. Holger identified himself by various names and titles, including the President of the US and Republic of Alaska. [CP 15]

The State immediately filed a Memorandum of Record. [CP 16] The memorandum identified that Louis Holger was not an attorney, but rather a troubled individual in Alaska with a history of filing frivolous lawsuits. The memorandum recorded the procedural history of the case, and noted that the defendant appeared to be representing himself. The memorandum included a request that the Court engage the defendant further as to whether he wished to represent himself or obtain assistance from a licensed attorney.

6. October 23, 2017 Arraignment Hearing

The defendant appeared for his arraignment on October 23, 2017 before Judge Rawson. The Court asked the defendant if he had retained an attorney. The Defendant replied that he had appointed a special master, and that the individual lived in Alaska. After further inquiry, the Court

explained to the defendant that the referenced special master was not an attorney. [RP 16:1 – 19:17]

The Court fully explained to the defendant his rights at arraignment, and informed the defendant of the charge against him. The defendant stated he had no questions about these rights or the charge. [RP 19:20 – 23:10]

The Court explained to the defendant that while he had a right to represent himself, the Court would not entertain the defendant's request to have a "special master" represent him. The Court engaged the Defendant in a lengthy colloquy as to whether he wished to represent himself. "So, I need to be clear here today. 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 24:8 – RP 24:12]

The Defendant answered that he wished "to go forward and represent myself, Your Honor." [RP 24:13 – 24:17] The Court asked the defendant if he was familiar with the rules of evidence and the rules of criminal procedure. The defendant replied that he was, and that he had previously represented himself. The Court informed the defendant that if he chose to represent himself, he would be unable to simply take the witness stand and tell the jury a story. The defendant replied that he understood this. The Court asked the defendant why he wanted to

represent himself. The defendant replied that he (the defendant) was the only person he could trust.

The Court explained to the defendant that the Court believed that the defendant would:

[Be] better off being defended or represented by a trained lawyer rather than by yourself. I think generally those that represent themselves make an unwise decision...I would strongly urge you to not represent yourself, to have counsel assist you and represent you. There's a lot of dangers and disadvantages in self-representation, but if you still desire to represent yourself and to give up that right to be represented by a lawyer, I need to know, are you doing that freely and voluntarily?

[RP 25:18 – 26:6]

The defendant answered “Yes, Your Honor.” [RP 26:7] The Court stated that it was reluctantly finding that the defendant knowingly, willingly, and intelligently waived his right to an attorney. [RP 26:13 – RP 26:25]

7. Omnibus Hearing and Confirmation of the *Defendant's Pro Se* Position

On November 6, 2017 State filed its Omnibus application with the Court. [CP 22] The defendant never filed an omnibus application.¹ The

¹ Appellate Counsel suggests on page 9 of their brief that the State did not disclose available video evidence. The State disclosed all the evidence it possessed to the Defendant through certified mailing to the residential address the Defendant expressly provided to the State.

defendant filed a document that included an attachment from Louis Holger. The attachment stated that Louis Holger intended to file some kind of legal action against Okanogan County judges for fiduciary fraud, unlawful process of agency, abuse of process, false claims, oppression of justice, aggravated physical assault, kidnaping (sic), human trafficking, crimes against humanity, and perjury. [CP 21]

The defendant failed to appear for a hearing on November 27, 2017. Instead of being present in Court, he was arrested for Driving Under the Influence of Drugs, Use of Drug paraphernalia, and Driving While License Suspended or Revoked. The Defendant was immediately arrested on this new law violation, and a Court appearance was held the following day, November 28th 2018. [RP 39 – 42]

The Court took this time to ask the defendant if he still wished to represent himself:

The Court: Mr. Zahn, you had expressed previously that you wanted to represent yourself, therefore, Mr. Wargin, at one point who was counsel assigned to you withdrew based on that representation. Are you asking the Court at some point to have counsel appointed for you or are you still desiring to represent yourself?

The Defendant: No, I've got the summons and uh and uh um my....

The Court: Are you still- in this matter are you desiring to continue

The Defendant: Yeah...

The Court: To represent yourself?

The Defendant: All my paperwork is gonna be turned in for me. I'm gonna represent myself, yeah.

[RP 43]

The Court criticized the defendant for the ongoing failure to file his omnibus application. The Court urged the defendant to seek counsel. “And you violated prior Court orders by having alleged additional law violations and so I’d strongly urge you to consider having counsel appointed for you.” In response to this, the defendant simply replied “No.”

[RP 44:1 – RP 20]

B. Jury Trial

1. State’s CrR 3.5 Hearing.

The State’s 3.5 hearing was held on the morning of trial. Judge Henry Rawson heard testimony from Sergeant Kevin Arnold. Sergeant Arnold testified that he spoke with the defendant on the morning of September 26, 2017. [RP 114] Sergeant Arnold spoke with the defendant in the booking area of the Okanogan County jail, and informed the defendant of his *Miranda* rights. After being read his *Miranda* rights, the defendant asked Sergeant Arnold what he (Sergeant Arnold) wanted to talk about. Sergeant Arnold asked the defendant if he brought narcotics

into the jail. The defendant replied that he had brought them (drugs) in, and asked why it mattered. Sergeant Arnold explained that there was a distinction between the Defendant bringing drugs into the jail himself versus obtaining them from someone in the jail. Sergeant Arnold told the defendant that if the drugs weren't his then he would question other people. The defendant replied that he didn't want to speak anymore. The defendant then asked for a lawyer. [RP 114 -118] The Court found that the defendant's admission to possession of narcotics was admissible. [CP 63]

2. Opening Statements

The State's opening statement was brief. It outlined the anticipated testimony of the five witnesses. This included a summary of Sergeant Arnold's anticipated testimony that:

He asked the defendant, well, basically did you...bring this into the jail or did you get it from somebody else in the jail, and the defendant answered that he brought it into the jail. The defendant declined to say really anything further about the event. Sergeant Arnold took the suspected drugs and these were packaged up and they were sent to the crime laboratory.

[RP 126:22 – RP 127:4]

The defendant then gave his opening statement. The defendant told the jury that “the same thing could have happened to somebody else, but that person doesn't get in trouble.” [RP 127:18 – 128:4] Upon the State's

objection, the Court reiterated that “opening statement in this proceeding is first of all, not evidence. What it is is what you believe the evidence will be and what you intent to show. That’s what the purpose of opening statement is, what the evidence will be. [RP 128:8 – 128:17]

3. Trial Testimony

Deputy Gordon Mitchell

Douglas County Deputy Gordon Mitchell testified that he arrested the defendant on September 25, 2017. Deputy Mitchell performed a search incident to arrest. This search involved patting down the defendant’s clothing and removing any items from his pockets. Deputy Mitchell transported the defendant to the Okanogan County Jail. [RP 129:6 – 131:18] During this transport, Deputy Mitchell noticed that the defendant appeared to be “fidgety” and moving around in the back seat of the patrol car. Deputy Mitchell stopped and conducted another pat down search on the defendant, but did not locate anything of significance. [RP 131:19 – 132:3] Deputy Mitchell booked the defendant into the Okanogan County Jail. [RP 131:19 – 132:3] The following day, Deputy Mitchell reviewed surveillance footage from his patrol vehicle. The footage showed the defendant putting his right hand deep into the front of his pants. [RP 132:4 – 133]

Sergeant Kevin Arnold

Sergeant Arnold testified that on the morning of September 26, 2018 he responded to the Okanogan County Jail. Several members of the jail staff advised the Sergeant that they located narcotics on the Defendant's person and in the defendant's "property tub." The item found on the defendant's person was a black tar type substance. This substance was concealed within a sock. [RP 138 – 141]

Sergeant Arnold testified that he contacted the defendant and informed him of his *Miranda* rights. Sergeant Arnold told the defendant that he wanted to know if he brought the substance into the jail, or if he acquired it while he was inside of the jail. The defendant asked the Sergeant why this mattered. Sergeant Arnold replied that there was a difference in the potential charge, and also that he wanted to know if there was any other individual involved. The Defendant told Sergeant Arnold that he brought it (the drugs) in, and that he didn't want to speak with the Sergeant about it any further. [RP 142:8 – RP 143:17]

Sergeant Arnold explained to the jury that he took custody of the suspected drugs. After photographing, weighing, and packaging the items, he placed them into a secure evidence locker. This evidence was later sent to the Washington State Crime Laboratory for testing. The evidence was

subsequently returned to the Sheriff's Office with confirmation that the item contained heroin. [RP 143:6 – 151:2]

Dr. Jason Stenzel

Dr. Stenzel of the Washington State Crime Laboratory testified that he received the suspected drug evidence from the Okanogan County Sheriff's Department. [RP 156 – 162] Dr. Stenzel testified that he analyzed the substance using two scientifically established testing methods: mass spectrometry, and flame ionization. These tests confirmed that the suspected drugs were heroin. [RP 163 – 170]

Okanogan Correction's Staff Testimony

Correction's Deputy Craig Caswell testified that on September 26, 2018 he received information that the defendant (an inmate) might have drugs. Deputy Caswell was instructed to search the defendant. Deputy Caswell testified that he and Sergeant Parsons brought the defendant into the medical room of the jail. They told the defendant that he was going to be strip searched, so if he had anything he might as well give it up. The defendant removed socks from his underpants and handed the socks to Deputy Caswell. Deputy Caswell could feel that there was something inside of the sock, and handed the sock off to Sergeant Parsons. [RP 175 – 178]

Sergeant Parsons testified that on September 26th 2017 he learned that the defendant may have put something into his (the defendant's) pants prior to the booking process. Sergeant Parsons decided to perform a strip search of the defendant. Sergeant Parsons and Deputy Caswell brought the defendant to the jail's medical room, and told the defendant they were going to perform a strip search. The defendant pulled out a bundle of socks from his pants. Inside one of the socks was a packaged item that Sergeant Parson's believed was drugs. Sergeant Parsons then secured the suspected drugs, and transferred them to Sergeant Arnold. [RP 179:16 – 186:20]

Closing Arguments and Stipulations as to Evidence

The Court instructed the jury using a series of pattern jury instructions. [RP 205 – 215] The State's closing argument was brief, and focused the jury on the legal definition of "possession." The State then emphasized that a forensic scientist confirmed that the seized drugs were heroin. The State never referred to the defendant's decision to cease speaking with Sergeant Arnold. [RP 215:13 – 121:14] The defendant's closing argument was essentially a plea for jury nullification. The Court sustained the State's repeated objections. [RP 221:16 – 223:13]

Immediately after closing arguments, the Court noted that "we have drugs here and typically they don't go back to the jury room with the

jurors and that's somewhat why we have pictures here and I don't anticipate that." [RP 224:18 – 224:22] The Court then explained to the jury that "that bag" and "those bags" would not go back immediately go back to the jury room. [RP 225:5 – 225:17] After the Court excused the jury, the State asked that the jurors be permitted to view the seized drug evidence (Exhibit 10) if they wished. The defendant did not object. The Court then instructed the bailiff to inform the jurors they would be able to view Exhibit 10 upon request. [RP 229 – 232]

C. Verdict and Sentencing

The jury found the Defendant guilty of possession of heroin. [CP 67] Sentencing was held on January 4, 2018. The State asked that the Court sentence the defendant to 5 months in custody and to impose 12 months of community custody. The State asked that the Court impose standard legal-financial obligations. The sentencing recommendation was based on the defendant's two prior felony convictions, and substantial misdemeanor and gross misdemeanor criminal history. The State also drew the Court's attention to a drug DUI that the defendant committed while he was driving to one of the pretrial hearings. [CP 72]

The defendant stated that 5 months seemed to be an excessive sentence, and castigated the prosecutor for not knowing what it was like to use drugs or withdraw from drugs. The defendant stated he didn't need

“rehab” and stated that it takes users around one week to withdraw from drugs. The defendant voiced frustration that he was trying to save money and not “rack up a bill” with legal-financial obligations. [RP 245:9-245:6]

The Court then engaged the defendant in an inquiry regarding his ability to pay legal-financial obligations. The Court asked the defendant if he had been employed during the last three years. The defendant replied that he was currently employed, and expected to remain employed upon release from jail. The Court found that the defendant had the ability to pay, and imposed standard legal-financial obligations. The Court imposed a jail sentence of only three months confinement. ²[CP 74]

ARGUMENT

A. The Court Properly Granted the Defendant’s Request to Proceed as *Pro Se* Counsel

The defendant was properly granted his Constitutional right to proceed *pro se*. Wash Const, art. I, § 22; *State v. Madsen*, 168 Wn.2d 496, 503, 229 P.3d 714, 717 (2010).

The defendant knowingly, voluntarily, and intelligently waived his right to an attorney. Although the Trial Court repeatedly discouraged the

² The State takes no position on appeal regarding the imposition on LFO’s. The State would only note that the \$100 DNA assessment was properly imposed because the Defendant never had his DNA previously collected.

defendant from representing himself, the defendant repeatedly stated his desire to proceed as his own attorney.

This reviewing Court must evaluate the defendant's waiver of counsel under an abuse of discretion standard. *In re Rhome*, 172 Wn.2d 654, 667, 260 P.3d 874, 882 (2011); *See also State v. Lawrence*, 166 Wn. App. 378, 394, 271 P.3d 280, 288 (2012). A Court abuses its discretion when an order is manifestly unreasonable, or based on untenable grounds. *State v. Englund*, 186 Wn. App. 444, 454, 345 P.3d 859, 865 (2015).

In this case, the Court proceeded cautiously. At the defendant's first scheduled arraignment the defendant stated that he wished to represent himself. The Court permitted the defendant's assigned attorney to file a notice of withdrawal. At a subsequent appearance the defendant stated he was working on potentially hiring an attorney. The Court granted the defendant's request to continue his arraignment for this purpose. The defendant then began filing quasi-legal documents. At this point, it became clear to the State that the defendant was acting as his own attorney. The State asked the Court to perform a detailed inquiry into the Defendant's intent regarding representation.

At the next appearance, the Court asked the defendant if he wished to act as his own attorney. The defendant repeatedly stated that he wished to represent himself. These pro se requests were unambiguous and

deliberate. *Cf. State v. Luvene*, 127 Wn.2d 690, 699, 903 P.2d 960, 966 (1995). *See also State v. Breedlove*, 79 Wn. App. 101, 108, 900 P.2d 586, 590 (1995) (holding that a defendant's earlier unclear and equivocal request to proceed pro se did not bar his later clear and unequivocal request to represent himself).

The Court's decision to permit the defendant to represent himself is supported by the record. The Court asked the defendant if he had legal experience. The defendant responded that he did have some prior legal experience, and was familiar with the rules of evidence. The Court told the defendant that if he chose to represent himself he could not simply say whatever he desired to the jury. The Court explained that a trained lawyer would be more familiar with procedures and would be better positioned to defend him. The defendant stated that he understood, but still wished to represent himself because he was the only person he could trust. This reasoning is not uncommon among *pro se* defendants. *See State v. Lawrence* at 396. The defendant's competency and mental capacity was never at issue in this case.

The defendant's request was unequivocal. The court found that his waiver of counsel was knowing, voluntary, and intelligent. This was based on a series of responses the defendant gave to relevant and appropriate questioning by the Court. Under these circumstances, the Court would

have committed error if it *denied* the defendant's request to proceed *pro se*. There is no basis for this reviewing Court to conclude that the trial court abused its discretion.

B. No Improper Testimony was Introduced Regarding the Defendant's Invocation of a Right to Remain Silent

Appellate Counsel argues there were repeated references to the defendant's invocation of his Constitutional right to silence. This is somewhat misleading. There were merely two references during the course of the trial that after the defendant admitted to bringing drugs into the County Jail, he didn't want to say anything further. There were no comments on his invocation of his Constitutional right to silence.

The first of these references was in the State's opening. The State noted that "He [Sergeant Arnold] asked the defendant, well, basically did you - did you bring this into the jail or did you get it from somebody else in the jail, and the defendant answered that he brought it into the jail. The defendant declined to say really anything further about the event." [RP 126:22 – 127:2] The second reference was the actual testimony of Sergeant Arnold. Sergeant Arnold explained that after the Defendant admitted to the crime, he didn't want to speak to the Sergeant anymore. [RP 142-143]

The first reference was not evidence. It was a small part of the State's opening statement. The State never suggested that the defendant refused to answer questions, or that he asked to speak with an attorney. There was no reference to the defendant affirmatively invoking his right to remain silent, or deciding to not answer the Sergeant's question.

The second reference was the actual testimony of Sergeant Arnold. Sergeant Arnold explained to the jury that after the defendant was informed of his *Miranda* Rights, he questioned the defendant about whether or not the defendant brought the drugs into the jail. Sergeant Arnold testified that the defendant asked why he cared. Sergeant Arnold told the Defendant that "it was a big difference in charging...if he wasn't the individual responsible for it, I'd like to know who was so that I could deal with that individual." RP 142:20 – 140:25. Sergeant Arnold said that the defendant "did tell me that he brought it in and at that point he didn't want to talk to me anymore." [RP 143:3 – 143:5]

Sergeant Arnold testified that the defendant answered his question, and then didn't want to speak anymore. From this testimony, it remains unclear as to whether the defendant even verbalized a decision to stop speaking or cease participating in an interview. The testimony simply revealed that the conversation ended after the defendant answered Sergeant Arnold's question. There was no testimony as to an unambiguous

request to remain silent. *Owen v. State of Florida*, 862 So. 2d 687, 696-98 (Fla. 2003), see also *James v. Marshall*, 322 F.3d 103 (1st Cir. 2003).

There were no subsequent questions, and there was no testimony relating to the defendant declining or refusing to answer any question.

Even if the Sergeant's testimony was improper, any error was harmless. There were no contested facts at this trial. The defendant's actual possession of heroin was undisputed. The defendant's credibility was not challenged - he admitted to possessing the drugs. The State never argued that the defendant was evasive in questioning or that he refused to answer probative questions. There was never any reference to the defendant terminating the interview. *Cf. State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d, and *State v. Pinson*, 183 Wn. App. 411, 415, 333 P.3d 528, 531 (2014) (In both cases the prosecutor explicitly argued that the defendant's silence in the face of questioning was indicia of guilt). The State specifically told the jury that it should not be distracted with any testimony regarding whether or not the defendant may have committed another crime by introducing drugs into the jail. [RP 220: 20 –221:8]

C. The Trial Judge's Comments Regarding Safe Exhibit Handling did not Prejudice the Defendant

At the conclusion of trial, the Court essentially explained to the jury that because of safety concerns, one of the exhibits would not be

immediately available for handling within the jury room. The Court was describing exhibits 10 and 11. The Court explained that contraband evidence would not normally go freely into the closed jury room.

The State acknowledges that the Court's explanation of exhibit handling was likely an impermissible comment on the evidence. However, the comment was not prejudicial to the defendant.

A defendant cannot avail himself of error as a ground for reversal unless it has been prejudicial. *State v. Cunningham*, 93 Wn.2d 823, 832 (1980) citing *State v. Rogers*, 83 Wn.2d 553 (1974).

Appellate courts long ago rejected the notion that reversal is necessary for any error committed by a trial court. Our judicial system is populated by fallible human beings, and some error is virtually certain to creep into even the most carefully tried case. The ultimate aim of the system, therefore, is not unattainable perfection, but rather fair and correct judgments When a court blindly orders reversal of a judgment for an error without making any attempt to assess the impact of the error on the outcome of the trial, the court encourages litigants to abuse the judicial process and bestirs the public to ridicule it As a practical response to the realities of the trial process, therefore, appellate courts have developed a series of doctrines for analyzing whether error in various types of cases was harmless. The fundamental premise of this sort of analysis is that a defendant is entitled to a fair trial but not a perfect one.

5 Wash. Prac., Evidence Law and Practice § 103.24 citing US v. Blevins, 960 F.2d 1252 (1992).

A prejudicial error may be defined as one which affects or presumptively affects the final results of the trial. When the appellate court is unable to say from the record before it whether the defendant would or would not have been convicted but for the error committed in the trial court, then the error may not be deemed harmless, and the defendant's right to a fair trial requires that the verdict be set aside and that he be granted a new trial. But, where the defendant's guilt is conclusively proven by competent evidence, and no other rational conclusion can be reached except that the defendant is guilty as charged, then the conviction should not be set aside because of unsubstantial errors.

If the error is of a Constitutional nature, the error will be deemed harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error. State v. Watt, 160 Wn.2d 626, 636 (2007). A Constitutional error does not require reversal when it is clear beyond a reasonable doubt that the jury verdict is attributable to the error. *Id.* citing Neder v. US, 527 U.S. 1, 19 (1999). The appellate court looks at the untainted evidence to determine if the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt. *Id.* citing State v. Guloy, 104 Wn.2d 412 (1985).

If the error is not of a Constitutional magnitude, the error is not prejudicial unless, "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected."

Cunningham, 93 Wn.2d at 832 citing Rogers, 83 Wn.2d 553; State v. Rhoads, 35 Wn.App. 339, 343 (Div.3 1983), *aff'd*, 101 Wn.2d 529 (1984).

The defendant was charged with possession of heroin. The Judge's comment that one of the evidence items may contain 'drugs' did not prejudice the defendant.

The evidence in this case was straightforward, uncontested and overwhelming. Corrections Sergeant Parsons testified that with his eighteen years spent as a Corrections Officer, he believed the seized substance possibly contained drugs. [RP 181:11 – 183:8] He and Corrections Deputy Caswell testified that the Defendant removed the drugs from his pants, and handed it to Deputy Caswell. [RP 176:24-178:25; RP 182:22- 183:8]

Sergeant Arnold testified that he had considerable training and experience dealing with narcotics. He testified that based on that experience, he believed the substance to be black tar heroin. [RP 151:22 – 152:11] Sergeant Arnold explained that he was sure that this substance was the item that was sent to the crime laboratory for confirmation testing. [RP 151:12 – 151:20]

Dr. Stenzel testified that he had worked for the Washington State Crime Laboratory since 2006, and his sole qualification was the analysis of controlled substances. He explained the various procedures involved in

testing suspected controlled substances. Dr. Stenzel authenticated the documentation associated with the chain of custody for drugs evidence. Dr. Stenzel explained that he weighed the suspected drugs, and then performed two commonly used methods of scientific testing for controlled substances. Both of these tests confirmed that the black tar-like substance contained heroin. [RP 152 – 172]

The Trial Court did not opine that the exhibit was heroin or suggest that the defendant possessed the heroin. In context of explaining the availability of admitted exhibits, the Court's comment was innocuous. The commentary did not suggest that the substance was heroin, only that the Court believed that when exhibits were actual drugs, these exhibits would not freely go back into the jury room for handling. The comment did not relieve the State of its burden of proof. The State had the specific burden of proving that the substance was heroin.

There were no witnesses that testified that the substance was not heroin. There was no evidence that cast any doubt on the integrity of the testing protocols. Multiple witnesses testified that they saw the defendant physically remove the heroin from his pants, and pass it to the Correction's Officer.

Had the error not occurred, the outcome would have been identical. Any rational jury would have found the Defendant guilty as charged.

Therefore, if any error is found by the Court, such error was harmless error.

CONCLUSION

For the aforementioned reasons, the State asks that this Court affirm the Defendant's conviction.

Dated this 11th day of March, 2019

Respectfully Submitted:

A handwritten signature in black ink, appearing to be "David Stevens", written over a horizontal line.

David Stevens, WSBA #29839
Deputy Prosecuting Attorney
Okanogan County, Washington

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON) COA No. 358054
Plaintiff/Respondent)
)
vs.) CERTIFICATE OF SERVICE
)
Blake Andrew Zahn)
Defendant/Appellant)
_____)

I, Shauna Field, do hereby certify under penalty of perjury that on the 11th day of March, 2019, I caused the original Amended Brief of Respondent to be filed in the Court of Appeals Division III and a true copy of the same to be served on the following in the manner indicated below:

E-mail: katehuber@washapp.org

Kate R. Huber
Washington Appellate Project
701 Melbourne Tower
1511 Third Avenue
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U.S. Mail
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Signed in Okanogan, Washington this 11th day of March, 2019.



Shauna Field, Office Administrator

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